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Supreme Court, U. S.
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IN THE UNITED STATES SUPREME COURT

CARL R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington Corporation,

Petitioners,

vs.

THE NATURE CONSERVANCY, INC., a foreign corporation; COUNTY OF SAN JUAN; LINDA HENRY, DONALD WHITMILL and PATRICK ROE, individually and as County Commissioners of San Juan County; ROBERT McABEE, individually and as Director, San Juan County Planning Department; KENNETH R. MARGOLIS; and SPENCER B. BEEBE

Respondents,

and

STERLING MILLER; SASHA LEEPER; LISA PETERFREUND; LINDA MORRISON; and JOHN DOES ONE through SIX

Defendants.

PETITION FOR WRIT OF CERTIORARI

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ERRATA SHEET

The following corrections should be made in the Petition for Writ of Certiorari:

p.i "(. Issues Raised Below" should be "9. Issues Raised Below"

p.44, first (1st) line "...transfer development..." should be "...transfer of development..."

p.45, third (3rd) line from bottom: "Homes" should be "Holmes"

p.46, third (3rd) line above second quote: "destory" should be "destroy"

p.55, fourth (4th) line from bottom: "theorit-" should be "theoret-"

p.59, tenth (10th) line of text: "protection of loss" should be "protection of law"

p.63, fifth (5th) line: add "the" at end of line

p.70, sixth)6th) line from bottom: add "the" between "executed" and "Inventory"

p.76, sixteenth (16th) line of quote: "on" should be "an"

p.82, third (3rd) line: delete "for"

p.83, fifth (5th) line: "an" should be "or"

p.86, fourth (4th) line: "fromal" should be "formal"

P.A-7, eighth (8th) line from bottom: "filed" should be "field"

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PETITION FOR WRIT OF CERTIORARI

A. DECISION TO BE REVIEWED

This is a Petition for a Writ of Certiorari to review a decision of the Court of Appeals of the State of Washington, Div. I, entered October 8, 1979, reported at 24 Wn.App. 416, 601 P.2d 963 (1979). See App. p. 53. Petitoners' motion for reconsideration was denied November 29, 1979. See App. p. 65. Petitioners petitioned the Supreme Court of the State of Washington for discretionary review of said Court of Appeals decision. That Petition was denied (Cause No. 46758) on February 22, 1980, in an unreported decision (Vol. 1, Notation Orders, P. 250). See App. p. 68. Upon such denial, the above-cited decision of the Court of Appeals became the final decision of the Washington courts.

The above-cited Court of Appeals decision affirmed the decisions of the Superior Court of the State of Washington for San Juan County (Judge Dennis J. Britt, Snohomish County, sitting by designation) in Cause No. 3117, granting the various defendant's motions for summary judgment. See App. p. 31 to 49.

B. GROUNDS FOR JURISDICTION

1. Review is sought of the decision of the Court of Appeals of the State of Washington in Lange, et al v. The Nature Conservancy, et al, 24 Wn.App. 416, 601 P.2d 963 (October 8, 1979), recons. den., November 29, 1979; petition for review denied, February 29, 1980. The reported decision of the Washington Court of Appeals became the final decision of the courts of said State on February 22, 1980. Washington Rules of Appellate Procedure ("RAP") Rule 12.7.

2. The United States Supreme Court has jurisdiction to review the above decision, by certiorari, under 28 U.S.C. §1257(3) on the grounds that the validity of State (county) action and the lower courts' decision is claimed by Petitioners to be repugnant to the Constitution or laws of the United States and/or is in

violation of Petitioners' rights, privileges and/or immunities under the Constitution of the United States (Amend. V, Amend. VII and/or Amend. XIV, §1) and/or under the laws of the United States (42 U.S.C. §§1981-88).

C. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Washington Court of Appeals (and therefore the Washington Supreme Court) properly upheld the decisions of the San Juan County Superior Court granting Respondents' (defendants therein) motions for summary judgment.

2. Did the Washington Courts, on summary judgment, properly conclude that the Respondents had not taken the Petitioners' rights to real property in violation of the Consitution of the United States.

3. Were Petitioners denied their right to jury trial under the Constitution of the United States, Amend. VII?

4. Did the Washington Courts, on summary judgment, improperly conclude that Petitioners could not present, under the allegations of the Complaint, facts sufficient to prove prima facie, that

Respondents' actions deprived Petitioners of rights in property without compensation.

5. Did the Washington Courts, on summary judgment, improperly find that Petitioners had not shown, and could not show, the Respondents' joint actions, taken under color of state law, did not violate Petitioners' rights under the laws and Constitution of the United States for which remedy is available pursuant to the Civil Rights Act (42 U.S.C. 1981-88; R.S. §§ 1977-81, R.S. § 722, 90 Stat. 1981-88)

6. Did the Washington Courts, on summary judgment, improperly find that Petitioners had not shown, and could not show, that Respondents' joint actions constitute a conspiracy to deprive Petitioners and like persons of equal protection under the laws and Constitution of the United States and/or the State of

Washington and/or the County of San Juan, thereby allowing recovery under 42 U.S.C. § 1985-86 (R.S. § 1980-81)?

7. Did the Washington courts improperly award, pursuant to 42 U.S.C. § 1988 (Civil Rights Attorneys Fees Awards Act of 1976; 90 Stat. 2641), attorneys fees to Respondents?

8. Is there a genuine issue of fact as to whether or not The Nature Conservancy ("TNC" herein) and San Juan County, or their respective agents, jointly undertook and/or pursued a course of action with the goal of identifying and preserving private lands in San Juan County having features desirable to TNC, a private corporation angaged in the buying and selling of real property in violation of Petitioners' right to equal protection of the law under the United States Constitution?

9. Is there a genuine issue of fact as to whether the actions, publications, announcements, etc., of TNC and/or San Juan County have: (a) deprived the Petitioners of any or all beneficial use of their properties in violation of the United States Constitution; (b) "taken" those properties without just compensation; (c) deprived the Petitioners of any one of their Constitutional rights.

10. Might reasonable men conclude that TNC and San Juan County, and/or their respective agents, in violation of Petitioners' Constitutional rights, entered into, and pursued, a conspiracy to prevent further development on private lands having features TNC desired to preserve?

11. Might reasonable men conclude that the cooperative and concerted actions of the Respondents, in toto, constitute a

deliberate and intentional circumvention of mandated procedures for regulating land use that these actions violated Petitioners' Constitutional rights, and that those actions injured Petitioners?

12. Are State (in particular, Washington State) Courts empowered by the Civil Rights Attorney's Fees Awards Act of 1976 (42 USC §1988, as amended) to award attorney's fees to any party in a state court proceeding?

13. Did the Washington courts imporperly construe and/or apply the provisions of Amendments XIV and/or V to the United States Constitution in determining that Petitioners could not, under the allegations of the Complaint, prove that, due to actions taken by the Respondent County and/or its agents, Petitioners were entitled to compensation under said Amendments?

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution,

Amendment V:

> ...nor [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. United States Constitution,

Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...

3. United States Constitution,

Amendment XIV, §1:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. 42 U.S.C. §1983, R.S. §1979:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5. 42 U.S.C. §1985(3); R.S. §1980:

If two or more persons in any State or Territory conspire ...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws;...in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in futherance of the object of such conspiracy, whereby exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

6. 42 U.S.C. §1986; R.S. §1981:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the

preceeding section [42 USC § 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects, or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action...

7. 42 U.S.C. § 1988; R.S. § 722, 90 Stat. 2641:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES,"for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction

of such civil or ciminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes (42 USC §§ 1981-1983, 1985, 1986), title IX proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code (26 USC §§ 1 et seq.), or title VI of the Civil Rights Act of 1964 (42 USC §§ 2000d et seq.), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

E. STATEMENT OF THE CASE

1. Procedure Below.

The Complaint in the instant matter was filed in August, 1975. Jury trial was scheduled for early October, 1977. All Respondents moved for summary judgment of dismissal. On July 20, 1977, the trial court granted those motions in part, dismissing Plaintiffs' First Cause of Action (trespass) and two contentions relating to the Fourth and Fifth Causes of Action (Civil Rights) and dismissing Patrick Roe entirely. Motions for reconsideration were filed by all parties and, on September 1, 1977, the trial court orally granted all of the motions for dismissal. Following a hearing on September 19, 1977, the trial court entered its written order granting summary judgment of dismissal and awarding Respondents substantial attorneys' fees.

A direct appeal to the Supreme Court was sought by Petitioners but the matter was referred to the Court of Appeals, Division I, for consideration. Following argument on June 6, 1979, the Court of Appeals filed its decision citedabove. That decision sustained the trial court and awarded Respondents an additional $3,500.00 as attorneys' fees. As noted above, timely requests for reconsideration and for review by the Washington Supreme Court were denied.

2. The Land

This matter involves a unique tract of real property in San Juan County. San Juan County consists wholly of islands lying within Puget Sound in the Northwest corner of the State of Washington. The subject land consists of a small island; a sand/gravel bar covered at high tide connecting the island to San Juan Island;

a contiguous portion of San Juan Island; and the adjacent tidelands. The northeastern corner of the San Juan Island portion ends in a rocky promontory behind which is a low-lying area subject to southerly winter storms and protected by a now-breached bulkhead. Access (vehicular and utility) crosses this low area and the gravel bar. Throughout Petitioners' ownership, all the land has been considered as a single parcel.

3. The Petitioners.

Since the early 1950's Carl Lange had earned his family's living by developing residential building lots in the Seattle metropolitan area. Through that experience, he learned the factors affecting fair market value and the processes involved in converting land from one use to another. He also became familiar with the eminent domain pro-

cesses and the parameters of the exercise of that power. In 1961 Petitioners purchased a portion of the subject property. Before and after its purchase, Mr. Lange considered the property's possible uses. As he had in all his other property dealings, he considered, inter alia, the aspects of the property which made it unique, particularly its marine location and the quality of the tidelands and surrounding waters. He consulted with persons knowledgeable in the field of marine engineering and marine biology, obtaining preliminary feasibility studies and opinions. Prior to the publication of the Inventory, San Juan County had adopted no land use controls.

In late 1973, the Langes took up residence in a small summer cabin built in 1963. Their plans were to construct a permanent residence, convert the cabin

to a "pilot" marine research laboratory project, then proceed, as feasible, with full-scale seaweed ("iridaea Cordata") farming and marine research laboratories.

In early 1975, a much larger permanent residence was about one-half complete when the Lange's received in the mail, unannounced, a copy of TNC's Inventory, which identified their property as having "high" priority for preservation in its "natural" state. As Respondents intended, the land has since remained in the same condition, enforced deterioration (including errosion loss of over 800 sq. ft. per year) excepted.

4. Respondent The Nature Conservancy - Purposes and Position.

Through their publications and activities, TNC has attempted to make it quite clear that it is a "white hat" organization.

The Nature Conservancy is a national, non-profit, membership organization.

(More Than A Wish, The Nature Conservancy, An Introduction)

The Nature Conservancy is the organization concerned with the preservation of ecological diversity through the protection of natural areas.

(Ld.)

To save ecologically significant lands, the Conservancy

- identifies the most important areas, the ones that must be set aside;
- protects the lands, either through gift, purchase, or by assisting or advising government
- provides long-term stewardship for hundreds of Conservancy-owned preserves;
- strives to increase public awareness and education of the need to safeguard natural areas.

(Id.)

Although the organization is not a part of the government, Conservancy professionals work with government agencies at all levels to plan and implement cooperative programs to identify and inventory natural lands.

Additionally, the organization advises government on how best to protect all natural areas.

(Id.)

TNC's primary method of operation is through acquisition of "natural" properties. (Annual Report, 1976)

> Acquisition, however, is not the only way to protect a natural area, nor always the best way. Private organizations and public agencies can use a variety of techniques--voluntary, regulatory and legislative--for cost-effective protection of priority lands. The Conservancy has undertaken several studies of these non-acquisition techniques and their effectiveness.

(Id.)

Reiterated throughout their literature is the steps TNC takes to "preserve" property: (1) inventory; (2) preserve; (3) stewardship. That same literature shows an increasing desire to preserve more and more areas, combined with an increasing awareness of the finite nature of TNC's primary economic resource--

donated funds. That same literature also extols TNC's increasing ability to identify "natural" areas "in cooperation" with government through the "State Heritage" programs. The strong undercurrent coupling these two themes is that governmental preservation, with the "advice" of TNC, has become an increasingly important and effective part of TNC's efforts. Preservation through regulation preserves both land and TNC's financial resources.

5. Respondent San Juan County - Position

In early 1973, San Juan County had John Black as Assistant Planner. San Juan County, in 1973, was short of funds, short of personnel, and faced with a number of state-mandated projects. Respondent McAbee summarized the Department's position upon his arrival in September, 1973:

There were no plans. There was almost no data. There were no files. I couldn't find the budget.

Only half of budgeted funds were received.

6. The Inventory Process, Stage One - Conception

In June, 1973, TNC, with the assistance of a local committee, was raising funds to make payments on a tract of land it had purchased on Waldron Island, San Juan County. A TNC meeting was held on Lopez Island on July 14, 1973, (CP 158) at which a presentation was made by John Black. That meeting appears to have been substantially concerned with the newly-conceived Inventory process. It resulted in "... a semi-formalization of a cooperative relationship between the Conservancy Committee and San Juan County..." (Letter, Margolis to Schoen, July 25, 1973, App. p. 72) As a result, Margolis informed

John Black that:

> I think the potential for cooperation between the Conservancy and the County around the issue of land conservation and open space and recreation planning are very exciting.

(Letter, July 20, 1973, App. p. _____)

The efficacy of the Inventory process was elaborated in a letter from Margolis to John Black dated August 9, 1973 (App. _____):

> Implicit in the results of the Inventory will be information which will be essential to the development of comprehensive land-use planning for San Juan County, particularly in terms of scientific-based suggestions regarding the carrying capacity of various sites for recreational, domestic and industrial purposes. It is our intention, at a minimum, to share the results of this work with appropriate County officials. At a maximum, close coordination betwen the Inventory staff and the County could insure that information is developed in ways that will be most helpful to the County planning process.

(ID.)

> For Nature Conservancy purposes, areas will be evaluated in terms of preservation value, ecological defensibility and acquisition priority.

(Id.) Margolis again stressed the importance of active county support of the process. The Inventory represented the first step in TNC's method of doing business.

7. The Inventory Process, Stage Two - Activation

Initiation of Inventory process was a financial problem. The importance of the County's participation in the solution of that problem was repeatedly stressed. In September, 1973, shortly after commencement of the fund-raising activities, McAbee became director of the San Juan County Planning Department. Thereafter, TNC personnel contacted McAbee making him aware of the prior activities and causing him to understand that TNC was interested in determining:

> ... Where Nature Conservancy could be helpful to the County in its planning endeavor, particularly as it applied

to the natural systems, the nature [sic] characteristics of the county.

(McAbee deposition, App. p. 84) McAbee was also acquainted with TNC's interest in the proposed Inventory process.

> ... they apparently had been going through a change of direction within Nature Conservancy; that apparently for a long time they had indeed been in the acquisition phase of protecting the environment, but the renewed emphasis on the environment; nationally they just didn't have the money to continue that technique; and so they were trying to function through more established private and public channels for the purpose of protecting the environment.

(Id. App. p. 85)

> The only thing I can remember is the reference to the environmental concern being so great it was really tough on their treasury and they were seeking out more traditional methods of protecting the environment.

(Id. App. p. 86) Those "more traditional methods" were:

> ... legal techniques for preservation and enhancement of an environment in the public as well as the private sector, other than acquisition.

(Id. App. p. 86) At that time, McAbee:

> ...affirmed with considerable anticipation that the scientific inventory of natural areas would indeed be beneficial to the County in possessing knowledge essential to meeting the requirements of the Environmental Policy Act and other related legislative acts.

(Id., App. p. 85)

McAbee and TNC personnel made a request to the San Juan County Commissioners for formal approval of County participation in the TNC Inventory process. McAbee informed the Board that his Department had physical space and services which could be of use to TNC. TNC personnel informed the Board that their purpose was to locate natural areas which would need "protection" to survive and that, as an association, they had considerable scientific experience in identifying such areas. While they were not informed of the details of the proposal the Board formally approved County participation and assistance in the Inven-

tory process. (L. Henry deposition, App. p. 89) That participation included, at least making available office space, County files and data, Department personnels' local knowledge and generally utilizing the Department's "good offices." (McAbee, App. p. 87) The Board "...pretty much left up to Mr. McAbee to determine" what was to be included in that assistance. (Henry, App. p. 91)

McAbee felt that his Department should assist in the Inventory process in a manner different from that open to the average citizen. It was his opinion that TNC was acting, and the Inventory process was, "in the public interest", and therefore should be actively supported by the County, while an ordinary individual wishing to "develop" his property would not have that "public interest" aspect and would not receive that support. (McAbee App. p. 87) The position of the County

as a participant in, and "co-sponsor" of, the Inventory process was emphasized throughout.

The "field work" was completed during the summer of 1974. A draft of the results was circulated to and comments received by TNC from, inter alia the San Juan County Planning Department, Planner Dick Grout and Commissioner Linda Henry.

On November 21, 1974, TNC agents Margolis and Beebe presented the draft Inventory to the San Juan County Planning Commission. Whitmill and McAbee attended the meeting. Margolis there reiterated that TNC's goal was the preservation of natural areas. Beebe informed them that the Inventory led to preservation of natural areas; that TNC was ready for the next step in the implementation of the preservation of these areas; that TNC "...would like to be a cooperating, pri-

vate agent in the planning process in San Juan County"; and that the Planning Department "...had done their best to be sure that the information contained in the report is responsible." The Commission discussed, but took no action on, 12-month moratorium on identified areas to allow the County time to protect them.

8. The Inventory Process, Stage Three - Implementation

On April 18, 1975, the Langes received their first notice of any kind of the Inventory process - a copy of the completed Inventory with a cover letter addressed to "Dear Landowner" dated April 9, 1975. Mr. Lange examined the Inventory and the cover letter and became concerned about the effect the Inventory process had on his land. He recognized it as an encumberance on his property. He found the Inventory was on file and available for public use at the County Auditor's

Office and the Assessor's office where he was also informed that the Inventory had been used with regard to Open Space designations. After that he, with permission, examined the County Commissioner's files and found many pieces of correspondence in evidence before the trial court. The Inventory maps were publically displayed in the Planning Department offices.

The Inventory contains a guide (Part IV) for the County in the use of "More traditional public methods" in the implementation phase of the Inventory process. It recommends preservation of the listed areas through, inter alia, comprehensive land use plan, open space taxation designations, State Environmental Policy Act deliberations, a moratorium on land use changes, restrictive performance standards, and restriction of development.

> At the very least, the County can use its power to grant building and subdivision permits to prevent any development requiring such permits to take [sic] place within natural areas.

Appendix G of the Inventory lists additional implementation techniques, all of which consist of some form of acquisition (with sale to TNC first on the list and tax foreclosure last) or governmental prohibition.

Subsequently, the implementation phase of the Inventory process has been continued and is still continuing by TNC and San Juan County. Goose Island and Deadman Island were purchased by TNC. The Inventory is used by County officials in Open Space Taxation deliberations; in determining designations under the State and County Shorelines Management ordinances and the county Comprehensive Plan; in consideration of subdivision applications; and in Forest Practice Act permit considerations.

The San Juan County Shoreline Master Program adopted by the County is the most extensive implementation technique employed to date. In that Program, Langes' property has been designated as "conservancy" and "natural", which almost totally denies use of the property. Of all the "shoreline" areas in the Inventory, 50% are given the most restrictive classification ("natural") in the Master Program and over 78% are designated "natural" and/or "conservancy".

9. Issues Raised Below

The Constitutional issues and the federal statutory (Civil Rights) issues have been raised by Petitioners since the commencement of this case. See Complaint, App. 1. Those issues were also presented to the Court of Appeals. See "Issues Pertaining to Assignments of Error" from Petitioners' Brief," App. p.50.

F. ARGUMENT OF COUNSEL

None of the issues presented by this Petitioner have heretofore been determined by this Court; two (Civil Rights Act and Civil Rights Attorneys Fees Awards Act) issues which have not been the subject of a published decision in this context; and the third (compensation for taking) because each case must be considered on its own facts, see e.g., Berman v. Parker, 348 U.S. 26 (1954). Petitioners urge that a Writ of Certiorari issue to review all of the issues raised herein. The Washington courts misconstrued United States Constitutional and statutory law and have decided the case in a manner not in accord with applicable, and recent, decisions of this court.

1. Summary of Argument

The Washington courts held, essentially, that government action not through

formal resolution, etc. could not be the basis for an award of compensation in an "inverse condemnation" case. The only evidence before those courts was that Respondent San Juan County had taken action and that action resulted in Petitioners not having rights in their property that they previously enjoyed. Under such circumstances, the United States Constitution (Amend. V, XIV) require compensation for the properties taken.

That some governmental action, due both to the manner in which it was taken and to its result, deprived Petitioners of rights under the Constitution and laws of the United States (including "due process" and "equal protection" rights), triggering Petitioners rights under 42 U.S.C. §§ 1983-88. Recent decisions of this Court (cited infra) clearly support Petitioners position and show the error

of the Washington courts. However, the exact issue here presented has not yet been expressly determined by this Court.

Finally, the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C § 1988) had only recently been enacted at the time of the challenged trial court decision. The Washington courts did decide, however, directly contrary to the evidence of Congressional intent and persuasive opinions of this Court in similar cases. That evidence and those opinions show that an award of attorneys fees to a Defendant under that Act should be made only when it is shown and found that the plaintiff's action is clearly vexatious, frivolous and without foundation in fact or law. The lower courts did not, and could not, make such a finding. Again, however, this issue has not been decided by this court.

2. The Compensation Issue

(a) Applicable Facts

There is, in this case, no question that the Respondent San Juan County undertook action which its officials felt was an integral part of the County's responsibilities under State law. That action, was, in part, taken by surrendering part of the County's legislative and administrative discretion to TNC, a private corporation in the business of buying the particular type of property here involved at below-market prices. The Washington Shorelines Management Act (R.C.W. ch. 90.58) required the County to take inventory of all shorelands within the County. This was in part accomplished by giving TNC free reign (and official assistance and sanction) to identify properties having important "natural" (by TNC's definition) features.

The only evidence before the Washington courts was that these concerted actions had a definite effect on Petitioners'property and that official use of the Inventory by the County, and private below-market purchases of Inventoried properties by TNC, would continue. Though it is not expressly stated, the decision of both the trial court and the appellate courts was, since Petitioners could not show that the County had "adopted" the Inventory by formal resolution or had formally denied a permit application by Petitioners, they could never (under any facts admissable under the Complaint) prove a prima facia case. Such decisions fly in the face of the Washington rules relating to summary judgment (CP 56, almost identical to FRCP 56) and the decisions of this Court.

(b) All Actions Take

All government actions, whether in the form of a court action exercising eminent domain powers to obtain property for a public highway or in the form of an ordinance prohibiting the release of liquid chlorine in public market, have the effect of "taking" some right or opportunity previously enjoyed by all or part of the public. Even the person creating the most offensive, unwholesome nuisance has the right to do so until regulated, i.e. he/she has the right to risk being found liable for civil damages for injuries caused.

It appears that even the drafters of the Fifth Amendment did not intend that all governmental actions, however small, be accompanied by compensation. The question thus becomes: What level of thinking must be reached before "just

compensation" is required. That question may be more readily answered by examining what constitutes "just compensation", rather than examining what constitutes "taking" i.e. turning the "taking issue" into the "compensation issue."

(c) When is Compensation Required?

When a government physically appropriates a item of property, there has never been any question that compensation is required except in very limited, unusual circumstances. Similarly, when a government takes an action which has the same practical result as actual appropriation, compensation is required. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158 (1922). In both instances, the government has undertaken some activity which has diminished the property owner's rights in his property, without any countervailing benefit unless cash compensation is paid.

Focus on the compensation, rather than trying to categorize an action as under the "police power" or as a "taking" allows for a more objective, easier defined basis for determining when a governmental body is required to pay cash for its actions. The

analysis becomes:

(1) What action(s) did the government take, or have taken on its behalf?

(2) Did that action have an effect on rights (personal or to property) of persons or a person?

(3) Is the party before the Court one of those persons whose rights were/ are affected?

(4) What right or interest of the party was removed or restricted?

(5) What is the value of that lost/ affected right or interest?

(6) What benefit did/will the party receive as a result of the governmental action?

(7) What is the value of that received benefit?

(8) Is the value of the received benefit reasonably commesurate with the value of the lost/affected right?

(9) If the answer to (8) is "no", what is necessary (i.e. cash, benefit) to justly compensate the party?

Such a formulation does not require the expertise of an appellate judge. Any local government could, when considering enacting land use or other legislation, if

objective, work through the formula, determine the compensation which would be required and then decide if the public as a whole would benefit from that regulation sufficiently to justify the expenditure of that amount of tax dollars, or decide to change the proposal in such a manner as to provide greater off-setting benefit to the affected parties, thus eliminating the need for tax dollars.[1]

Outlawing obnoxious nuisances does benefit everyone, including the owner of the prohibited use - even he is freed from the possibility of having a similar or more obnoxious use installed next door to his residence. Area-wide zoning, by the same analysis, benefits everyone. See Euclid v. Ambler Realty Co., 272 U.S 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926). With the above formula in mind, compare non-compensable general zoning to compensable "spot

1. See, Owen v. City of Independence -U.S.-(No. 78-1779, April 16, 1980) at v. 35.

zoning" which arbitrarily singles out a particular parcel for different, less favorable treatment. See 2 A. Rathkopf, The Law of Zoning and Planning, 26-4 and 26-4 - 26-5, N.6 (4th ed. 1978). In the latter instance, the property owner receives no benefit (compensation) to counter the rights taken unless he is paid cash.

It is submitted that the difference of opinion observed in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978), would, at least, have been more clear had the above formulation been used. In Penn Central, there was no dispute as to the operative facts. The New York City landmark law restricted modification of Grand Central Station, but did provide procedures for amelioration the effect of the prohibition through at least the potential of obtaining permission to make structural

changes and/or the transfer development rights. Central to the disagreement between the Penn Central majority and dissent is the characterization of the governmental action involved. The majority states:

> ...the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan. (footnotes omitted)

438 U.S. at 132. Stated thusly, the benefit to the City's citizens and landowners (including the Plaintiff's), i.e. fostering civic pride, protecting tourist attractions, supporting and stimulating business and industry (NYC Admin. Code, ch 8-A, § 205 - 1.0(b), 430 U.S. et 109), is emphasized.

The Penn Central dissent states:

> Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. (footnotes omitted)

438 U.S. at 138. And:

> The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the industrial properties.

438 U.S. at 139. Stated thusly, the incidence of the costs resulting from designation as a landmark is emphasized.

As appears from the differing opinions, the central disagreement in Penn Central was the value of the rights removed and the value to the landowner resulting from the enactment/designation itself. While it may not change the result, use of the above formulation would at least clarify the disagreement.

Both Penn Central opinions, and hundreds of others, rely upon the opinion of Mr. Justice Homes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L.ed. 322, 43 S.Ct. 158 (1922). In that case the State

of Pennsylvania had passed a law forbidding the mining of coal in such a way as to cause surface subsidence. The Court recognized that

> Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change inthe general law.

260 U.S. at 413. The Pennsylvania Coal case deals exclusively with "police power" types of governmental action. The opinion recognizes the weight to be given to the judgment of the legislature in its exercise of the "police power" but further recognizes that, without some limitation, the "police power" could destory the due process and contract clauses of the Constitution.

> One fact for consideration in determining such limits is the extent of the dimunition. When it reaches a certain magnitude...there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts

Id. After noting that the Fifth and

Fourteenth Amendments prohibit taking of property for public use, the Court states that prohibition is qualified by the "police power" with respect to which:

> ...the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes to far it will be recognized as a taking.*** We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant acheiving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree - and therefore cannot be disposed of by general propositions.***
>
> *** But the question at the bottom is upon whom the loss of the changes desired should fall.

260 U.S. at 415-16.

For nearly sixty years, courts have defined, distinguished or otherwise attempted to deal with the Pennsylvania Coal decision, in large part trying to

define some imaginary line between "police power" and "taking", a line not created by that decision. As governments have expanded their desires to improve the public condition into new areas, the "taking issue" has become more and more critical. In Penn Central Transp. Co. v. New York City, supra, the Court recognized, as did Mr. Justice Holmes that each case requires an essentially ad hoc factual inquiry and admitted that

> ...this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government [i.e., the public], rather than remain disproportionately concentrated on a few persons.

438 U.S. at 124. However, classifying governmental actions into ones which are "takings" amd ones which are "merely" exercises of the "police power" begs the question. The at least theoretical basis

for all governmental action is the public benefit, whether those actions are justified under eminent domain, police power, or some other catchword. As recognized by Mr. Justice Holmes in Pennsylvania Coal and by Mr. Justice Brennan and Mr. Justice Rehnquist in Penn Central, the ultimate question is what is the loss occasioned by the governmental action and who should pay for it. It is submitted that use of the above-suggested formulation will not change the requirement for a case-by-case analysis but it will provide a consistent method for answering that ultimate question by focusing on the real issue (i.e. cost and benefit) rather than on conclu sory labels.

The application of the Fifth and Fourteenth Amendments, fundamentally, is a very practical matter. There is nothing in any of the decisions of this Court

which states or intimates that if a governmental agency takes action in a particular form, the results, automatically and without regard to magnitude, will not require compensation. In contrast, the Washington courts in the instant matter become stuck in the fixation on labels and forms which has become a hallmark of cases dealing with the "taking issue".

(d) Washington Courts' Decision Inconsistent

The basis for the Washington courts' conclusions is best ascertained by examining what they did not conclude. They did not conclude:

(1) That San Juan County did not participate in the Inventory process.

(2) That TNC was not a private entity engaged in buying and selling land.

(3) That San Juan County's participation in the Inventory process was meaningless.

(4) That the publication of the Inventory did not have an adverse impact on the market value of Petitioners' land.

(5) That the publication of the Inventory was not intended to, and did not, have an adverse effect on the uses to which Petitioners might put their land.

(6) That Petitioners' ability to deal with their property, as a practical matter, has not been affected.

(7) That the purpose of the Inventory and the Inventory process was not to restrict the uses to

which the identified properties might be put, i.e. that the intention was not to obtain :preservation" of those properties.

(8) That the purpose of the Inventory and the Inventory process was not intended to benefit the public at large.

(9) That "preservation" of the identified parcels would not benefit the public at large.

(10) That San Juan County, through its actions did not indicate its intent to achieve the purpose of the Inventory process.

What the Washington courts did find was, without any regard to all of the above, since San Juan County had not formally passed a resolution stating its obvious intention, and/or formally adopting the Inventory as law, and/or had not formally denied Petitioners a permit for the reason that their property was included in the Inventory, that therefore Petitioners could not prove a cause of action under any theory of law.

There is no evidence in Griggs v.

Allagheny County, 369 U.S. 84, 7 L.Ed.2d 585, 82 S.Ct. 531 (1962), that the Allagheny County government formally adopted a resolution fixing the bottom of the glide slope for aircraft approach within a few feet of the Grigg's chimney. The practical effect, of the County's action in buying the nearby property for an airport was, however, just that. And the practical effect of the existence of the glide slope in that location was the inability of the Griggs to use their property as a residence, hence a "taking" by the County, i.e. the Griggs' portion of the public benefit of having the airport was not reasonably commesurate with their loss of use. See, to the same effect, U.S. v. Causby, 328 U.S. 256, 90 L.Ed. 1206, 66 S.Ct. 1062 (1946); Ackerman v. Seattle, 55 Wn.2d 400, 348 P.2d 664 (1960). In none of these cases was it required

that the Plaintiff show that the government Defendant took some direct formal action with respect to Plaintiffs' property. They each, however, decided that that government agency had taken action with an adverse effect on the Plaintiffs' property which was not off-set by the Plaintiffs' participation in the resulting public benefit. There was no "average reciprocity of advantage" (Pennsylvania Coal v. Mahon, supra) sufficient to equal the Plaintiffs' particularized loss. Therefore cash compensation was required.

Similarly, in Agins v. City of Tiburon, 24 Cal.3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979), prob. juris. noted, 100 S.Ct 658 (1980), the California court (while finding strenuously against the landowner) found the fact that no permit had been requested to be totally unimportant.

Both Congress (in 42 U.S.C. § 1933) and this Court (in Monell v. New York

City Dept. of Social Services, 436 U.S. 658 (1978) recognized that not all governmental action is in the form of formal resolutions or ordinances. Custom and usage are as much a part of day-to-day government as they are a part of day-to-day business. See, also Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) and Nashville, C. & St. L. R. Co. v Browning, 310 U.S. 362 (1940).

If the Washington courts had not been unwilling to look beyond formalities, they would have recognized that San Juan County, in conjunction and concert with TNC, had taken and was continuing to take, action(s) which were intended to affect a small number (57) of the parcels of privately-owned land in the County for the theoritical benefit of all of the public and, "incidentally", TNC. The Washington courts held, essentially, that even though

the Respondents may have accomplished their goal, the County was not required to pay compensation since the result had not been accomplished through formal resolution. That decision is contrary to Monell, supra, and reason.

Viewing the case under the formula suggested above:

(1) What actions did San Juan County have taken on its behalf?

The evidence is that San Juan County officials participated fully in the planning, and execution of all stages of the Inventory process, including setting procedures and parameters, identifying potential "natural" sites, providing necessary logistical support, reviewing results and draft reports, acknowledging publically the potential "benefit" of the results, placing the Inventory in public officials offices with directions to use

it as an authorative source, and actually so using it in decision-making processes.

(2-3) Did that action have an effect on Petitioners' Rights?

Yes. The only evidence on the issue of effect was that the Inventory and the Inventory process had an immediate effect on the market value of Petitoners' property and that that effect would continue to become greater as the instances of governmental use of the Inventory increased.

The remainder of the questions raised in the suggested formula were not addressed by the Washington courts and will not be discussed in this petition. However, the fact that the government took some action which had an adverse effect on Petitioners' property presents a prima facie case upon which Petitioners have a Constitutional right to a jury trial.

It is respectfully submitted that the Washington courts' granting of Respondents' motions for summary judgement was based upon an inaccurate comprehension of this Court's decisions construing the Fifth and Fourteenth Amendments and should be reversed.

3. CIVIL RIGHTS ACT OF 1871.

In their Complaint, Petitioners alleged that the joint actions of the Respondents had the effect of depriving Petitioners of rights, privileges, or immunities secured by the Constitution or laws of the United States and requested relief under 42 U.S.C. § 1983 (quoted supra). Petitioners further alleged that Respondents engaged in a conspiracy to deprive Petitioners of equal protection of loss and/or equal privileges and immunities under the law, thus alleging a claim for relief under 42 U.S.C. § 1985(3) (quoted supra). Petitioners further alleged that the Respondent County Commissioners (Whitmill, Henry and Roe) knew of the conspiracy and had the legal authority to prevent it, but chose not to do so, thus alleging a claim for relief under 42 U.S.C. § 1986, (quoted supra). As to each of these allegations, and the facts presented

on Respondents' motions for summary judgment, the Washington courts misconstrued both the facts and the applicable law.

(a) 42 U.S.C. § 1983

(1) "Compensation" and Due Process.

The Washington Court of Appeals, as to the claim for relief under § 1983 stated merely that it found no authority for the proposition that public hearings must be held before a governmental body may participate in an information gathering process, therefore no violation of a constitutional right occurred and no claim for relief was stated.

There is no question that a person's rights to property are protected under § 1983. In Lynch v. Houshold Finance Corp., 405 U.S. 538, 544, 31 L.Ed.2d 424, 92 S.Ct. 113 (1972), the Court held:

> Acquisition, enjoyment and alienation of property are among those [basic civil] rights [protected by the Civil Rights Act of 1871] . Jones v. Mayer

Co., 392 U.S. 409, 432, 20 L.Ed.2d 1189, 1203, 88 S.Ct. 2186.

The Court there noted that Congress fully intended § 1983 to include allowing redress for deprivation of property. There also is no question, after Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978), that an action for a "taking" can be brought under § 1983. Further, a municipality (such as San Juan County) has no immunity from liability under § 1983 and the good faith of its officers/agents is not a defense. Owen v. City of Independence, Mo., ____U.S._____, ____L.Ed.2d____,_____S.Ct._____(Case No. 78-1779, decided April 16, 1980).

To the extent that a "taking" is actionable § 1983, all of the preceeding discussion concerning the compensation issue is applicable to the § 1983 issue. However, Petitioners' rights under that section and the Constitution are not limited to that

issue. Innumerable Constitutional and statutory rights have found protection under that section.

Prior to the County's commencement of the implementation of the Inventory, Petitioners had a reasonable economic expectancy of the use of their land for gainful purposes, including marine research, seaweed farming and other things. Each of these purposes would, of course, provide income to support basic expenses (taxes, maintenance, etc.). Each of those purposes also require access and utilities service. The impact of the County's implementation of the Inventory, at a minimum, requires extensive, expensive and time-consuming applications, studies (to prove the Inventory's obvious errors to be what they are), administrative appeals and litigation. All the time these processes would be continuing, the sea is continuing to widen the

breach in the bulkhead protecting vehicular and utility access, increasing the rate of erosion, with the inevitable result of severing that access. When that access is severed, there will be no utility access to island and the only physical access will be by boat. Further, as erosion continues, a greater and greater portion of Petitioners' land is inundated by sea water. To prevent the inundation and severance of access, Petitioners would have to get permission, from the County, to replace and strengthen the bulkhead at a total cost exceeding $100,000.00. That additional cost obviously increases the basic costs of owning the property, making revenue-producing uses absolutely necessary. No one can reasonably expect persons in Petitioners' position to be economically able to support a $450,000 parcel of property for a single family dwelling without utilities.

It has long been held that a physical invasion by inundation is a "taking". Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871). It is thus actionable under § 1983. Monell v. Dept. of Social Services, supra. Additionally, the Respondents actions have very definitely, directly, and unreasonably interfered with (i.e., made impossible) distinct investment-backed expectations for the economic use and support of the land, requiring compensation and actionable under § 1983. See, Penn Central Transp. Co. v. New York, supra; Drakes Bay Land Co. v. U.S., 424 F.2d 574 (9th Cir. 1970); Arastra Ltd. P.ship v. Palo Alto, 401 F.Supp. 692 (N.D.Cal. 1975). Thus Petitioners have a claim for relief under § 1983.

The County, in taking the action that it did, never made factually-supported decision that action was required by, or even

consistent with, the public health, safety, morals, or general welfare. That alone may be the basis for finding that compensation is required (See, E.G., Arastra Ltd. P.ship v. Palo Alto, supra; Nectow v. Cambridge, 277 U.S. 183, 72 L.Ed. 842, 44 S.Ct. 447 (1928).) and a claim for relief under § 1983.

Petitioners were never given the opportunity to participate in the process leading to the placement of the Inventory document in County offices and deliberations, as an approved, authoritative land use regulation tool. It is theoretically possible that the Respondent County could have, following Constitutionally-accepted procedures, validly restricted Petitioners use of their land in a manner similar to that they have presently accomplished. Such a procedure may have allowed the conclusion that the restriction was for the public health, safety, morals or general welfare. However,

without the ability to participate, Petitioners due process rights were violated (without regard to the "taking" pigeonhole) and actionable under § 1983. The Washington courts' characterization as a "mere" information gathering process is a conclusion of fact and begs the question. Petitioners are entitled to a jury determination of the Respondents' liability under § 1983.

(2) Color of State Law.

Respondents (and apparently the Washinton courts) have taken the position that, in this matter there was no "state action". Sec. 1983 requires that the wrongful act be done "...under color of..." state law, custom or usage. In determining whether state action exists in any given factual situation, the "totality of circumstances" must be considered. Barrett v. United Hospital, 376 F.Supp. 791 (D.N.Y. 1974),

aff'd 506 F.2d 1395. "Color of state law" is a flexible concept which relates to whether the actor is "clothed with the authority of the state" and acts with regard to that authority, whether or not the actual act was authorized or proscribed by state law. Roberts v. Acres, 495 F.2d 57 (5th Cir. 1974). Actions of private parties in conspiracy or concert with, a state official, can satisfy this requirement. See, e.g., Timo v Assoc. Indemn. Corp., 412 F.Supp, 1056 (D.Okla. 1976); Moro v. Telemundo Incorporado, 387 F.Supp. 920 (D.P.R. 1974). A state official's mere "connoted approval" is sufficient. Barrett v. United Hospital, supra.

Respondents in the instant matter have stated that TNC was acting solely on its own. Even assuming that that contention is true (which Petitioners do not concede), if a private party undertakes action

which is "public" in nature and does something which the government might otherwise be required to perform, the private party's action is "state action". Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974). In his deposition, Respondent McAbee admitted that TNC was "acting in the public interest" and that the County was required by state law to gather the information included in the Inventory. Thus, even without acknowledgement of the county"s real participation in the Inventory's production there is, in the instant case, "state action." The Washington courts clearly misconstrued this requirement.

Based upon a proper understanding of the federal laws, Petitioners clearly have shown a prima facie case for recovery under 42 U.S.C. § 1983. The Washington courts' decisions should be reversed and Petitioners granted their right to a jury trial. Neither

the "good faith" of government or TNC agents (Owens v. City of Independence, supra) nor a lack of specific intent to damage Petitioners (e.g. U.S. v. Texas Ed. Agency, 532 F.2d 380 (5th Cir. 1976) is a defense.

b. 42 U.S.C. §§ 1985-86.

Unlike § 1984, § 1985 and § 1986 do not require any "state action" to allow recovery. Miles v. Armstrong, 207 F.2d 284 (7th Cir. 1953). Rights to free use and usufruct of real property has found protection under § 1985(3) (Cordeco Devel. Corp. v. Velasquez, 354 F.Supp. 1355 (D.P.R. 1972)) as have due process rights. See, Escalera v. N.Y. City Housing Auth., 425 F.2d 853 (2d Cir. 1970). 42 U.S.C. § 1986 grants an additional cause of action against officials who had/have authority to prevent violations of § 1985 but do not do so. There is no question that TNC and County officials, personnel and helpers planned and executed Inventory process. There also is no question that the responsible County officials and employees were fully aware of the plans and actions of TNC. County officials actively supported and participated in the Inventory

process and have undertaken its implementation stage.

In 1961, the Langes became members of a very exclusive and enviable group -owners of property abounding with scenic and natural attractions. The Inventory ostensibly confirmed the uniqueness of the property. It identified the Langes as members of that group of people owning property having higher-than-average "natural" features. While Respondents have tried to claim responsibility for creating this class, it is submitted that they did so only to the extent the Inventory's designations are based upon judgment and opinion instead of scientific fact.

The Inventory process was undertaken for the express purpose of identifying persons of Langes' class and "preserving" their properties. Obviously, an owner's right to "preserved" property are substantially

less than those of owners of "ordinary" non-natural-area properties, i.e., their rights and/or privileges are no longer equal. They no longer have the right to defend their property (land) even against the environment. The implementation portion of the Inventory process, particularly the Shoreline Master Program, realizes that discriminatory goal.

Respondents jointly developed a plan, and acted in furtherance thereof, to deprive Petitioners and others in their class of their Constitutional rights solely because they were owners of property having "natural" values. Thus, a cause of action is stated under 42 U.S.C. § 1985. Equally, County officials had full authority and opportunity to prevent fruition of the plan but chose not to do so. Thus a cause of action under 42 U.S.C. § 1986 is stated.

The Washington courts clearly miscon-

strued § 1985(3) and the federal court decisions thereunder. It is also clear from the Washington court's decisions that, had they found a claim for relief under §1985(3), they would also have found a claim for relief under § 1986.

4. CIVIL RIGHTS ATTORNEYS FEES AWARDS ACT OF 1976

In 1976, Congress enacted Public Law No. 94-559. As amended by that Act (90 Stat. 2641) Revised Statutes section 722 (42 U.S.C. § 1988) reads:

> The jurisdicition in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised

> Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Pursuant to the above section, the Washington courts awarded Respondents (defendants below) a total of $20,059.79 ($16,599.79 at trial level and $3,500.00 on appeal) as attorneys' fees.

Respondents requested attorneys fees in their initial answers to the Complaint. There was no serious effort by them to obtain a judgment for fees until after the passage of the above Act. After receiving briefs and hearing argument on the issue, the trial court made no finding of fact concerning the nature of Petitoners' claims. In its "Supplemental Memorandum Decision Regarding Attorney Fees & Costs", the trial court's operative statement was merely:

> None of the cases cited or reviewed disclose any basis upon which I could hold that [42 U.S.C.] section 1988 is inapplicable to this case and, therefore, I must hold that pursuant to Section 1988, an award of attorney fees to the prevailing parties herein is authorized by Section 1988 and is discretionary with the Court.
>
> I further feel that an award of attorney fees to the prevailing parties herein is well justified and, in addition, I am inclined to believe that a denial thereof could well be determined on abuse of discretion.

The Court of Appeals decision merely states that the trial court found an award proper under 42 U.S.C § 1988, agreed, and awarded an additional $3,500.00.

(a) Award by a State Court
Under § 1988 Not Authorized

The 1976 Act added the final sentence to § 1988. It authorized "the court" to allow reasonable attorneys fees, in its discretion, to the prevailing party. There would appear to have been no compulsion for Congress to add that language to § 1988 - it could well have adopted it

as a separate section. The pre-existing portion of § 1988 speaks exclusively to the authority of the United States District Courts, empowering them, where suitable, to apply the laws of the State in which the action is brought. There is nothing to indicate that "the court" as used in the 1976 addition was intended to apply to any class of courts other that the one which the statute otherwise governs, i.e. federal courts. The statute, as amended, does not authorize state courts to award attorneys' fees.

(b.) Award Improper
Without Appropriate Finding

Public Law No. 94-559 was enacted in response to the decision in Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 44 L.Ed.2d 141, 95 S.Ct. 1612 (1975) that, unless otherwise provided by statute, litigants must pay their own attorney fees. (see 122 Congress Record H12159, remarks of Rep. Drinan.)

While this particular statute has not been directly considered by the Supreme Court, it has considered an essentially identical provision, 42 U.S.C. § 2000e-5(k), 78 Stat. 261. In Christainburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), the question before the Court was "...under what circumstances an attorney's fee should be allowed when the defendant is the prevailing party in a Title VII (Civil Rights) action..." (54 L.Ed.2d at 652). The statute there under consideration provides:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs....

(42 U.S.C. § 2000e-5(k), 78 Stat. 261) Following a discussion of applicable cases, Congressional history and the parties' contentions , the Court held that, under 42 U.S.C. § 2000e-5(k):

> ...a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivilous, unreasonable or without foundation, even though not brought in subjective bad faith.
>
> In applying these criteria, it is important that a district court resist the understandable temptation to engage in post-hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.

(54 L.Ed.2d at 648)

It is clear that in adopting Public Law No. 94-559, Congress was aware that the Courts applied the rules set forth above and assumed that those rules would be applied to that enactment. See House Rep. No. 94-1558, P. 6-7 (App. 92).

Lower federal courts have consistently followed Christianburg in § 1988 cases. See Bowers v. Kraft Food Corp., 606 F.2d 816 (8th Circuit 1979); Hughes v Rapko, 578 F.2d 483 (3rd Circuit 1978); Waxman v Herzog, 455 F. Supp. 523 (N.D. Icc.1978);

Chin v. Kauikaolani Childrens Hospital, 445 F.Supp. 1375 (D. Hawaii 1978); Griffin v. Collins, 443 F. Supp. 1010 (S.D.Ga. 1978); and Goff v. Texas Instruments, Inc., 429 F.Supp. 973 (N.D. Tex. 1977). In each case the court examined the action and made a finding concerning the nature of the Plaintiff's action and in those cases where defendants were awarded attorney's fees (Goff, supra; Chin, supra) the claims of Plaintiff were found to be totally without merit. In Goff, the plaintiff admitted that he had not even alleged the "state action" necessary for a 42 U.S.C § 1983 action. In Waxman v. Herzog, supra, the court declined to award defendants their attorneys fees even though it was noted that there was a history of multiple suits by plaintiff against defendants and the matter was summarily dismissed, the court stating:

> Plaintiff's claims, while rejected, were not so meritless as to indicate bad faith or a sole purpose of harassment.

455 F.Supp. at 524.

The decision of the Washington courts in the instant matter is in direct conflict with Christianburg, supra, with the intent of Congress and with the essentially unanimous opinion of the lower federal courts which have considered the issue. The Washington courts' decision and award of attorneys' fees to Respondents should be reversed.

5. CONCLUSION

It is clear from Congressional records and numerous court decisions that the Fourteenth Amendment was adopted to for the purpose of having an effect in the real world. At the time of its enactment (and the enactment of the 1871 Civil Rights Act), a very real problem in human rights existed - the newly freed slaves were not being treated with the same courtesy as their prior masters. In the Fourteenth Amendment, it is patent that a persons right to life, liberty and property were (and are to be) considered equal. The protection from unlawful arrest and/or imprisonment by state authorities presently enjoyed by citizens grew from that Amendment. Why should a search which results in seizures of a person's right to property be subject to fewer restraints than a search which results in seizure of a person's right to

be free from physical restraint.

As TNC and San Juan County admit, in the real world the eagle is forced to abandon its home in the face of physical hazard it cannot control an invasion from individuals of its own species. The eagle does not continue to build up its aerie in a tree leaning from undermining erosion The Petitioners have been placed, by the joint, consensual action of Respondents, in exactly that position.

The 1871 Civil Rights Act was adopted, in large part, in response to the fact that, in the real world of the South following the Civil War, the Klu Klux Klan took actions, for its own personal ends, which deprived citizens of property, equal protection, due process and even life, with the full knowledge of "responsible" government officials. No doubt instances could be found where local southern govern-

ments allowed KKK members to operate out of public offices. Like the KKK, TNC was/ is pursuing what it sees as a worthy ideal. However, a white hat, rather than a white hood, does not justify otherwise illegal means.

With regard to the compensation "taking" issue, the Washington courts have seriously misconstrued the law as pronounced by this court. While that misconstruction may have resulted from legal uncertainty, that does not justify allowing those decisions to stand. The Washington courts formalized the dichotomy between "police power" and "taking" into artificial unreality. Legislators and administrators (and those courts) have come to believe that if any action is stamped with the "public benefit" i.e. "police power" label, it will not require compensation. There is no question that it would be to the benefit of the public if

Petitioners would deed their property to the County and then spend the balance of their money and lives "preserving" that property and giving guided tours and lectures. Is it therefore constitutionally permissible for the County to require that result without compensation? The answer is clear: NO.

Does the Constitution prohibit the achievement of the result or the taking of the associated formal action? Stated differently: If a person is deprived of a Constitutionally protected right, must he/she show a formal administrative or legislative action which directly and expressly dictates that result before compensation may be had for the loss? The airport overflight cases, among others, clearly show that the answer to that question must be no. The courts below, in this case have said: "yes, it does not matter what the

County does, the fact that the Petitioners were deprived of substantial rights to property use is not compensible unless some fromal governmental action expressly confirms the loss". A more blatant example of form over substance is rarely seen. The actual, practical result of the County/TNC Inventory process was a county investiture in the results produced by TNC. The County invested scarce resources, officials' paid time, and philosophical agreement in the process's idealistic goals. It stood in tandem with TNC in identifying privately-owned land which should be "preserved" "for the public benefit". Thereafter, that investment could/can only be justified by giving significance to its results.

As a matter of practical result, what is the difference between a formal, legalistic adoption of a resolution and a placement of the Inventory (with its emotional and

fiscal investment) in all County Offices for use in official deliberations? It is the Petitioners position that there is none.

The Washington courts would apparantly require Petitioners to obtain formal, expensive proof of a know fact - similar to requiring one to obtain in situ temperature measurements to prove the sun is hot. The application of practical wisdom and justice to the formality of the law is wisely preserved by the Constitution through the guarantee of trial by jury. The Washington Court's decision renders that guarantee nugatory.

It is respectfully submitted that a Writ of Certiorari should issue, the decisions of the Washington Courts reviewed and reversed.

Respectfully submitted

May 15, 1980

William V. Vetter
Attorney for Petitioners

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SAN JUAN COUNTY

CARL R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington corporation,	)	NO. 3117
Plaintiffs,	)	
vs.	)	COMPLAINT FOR TRESPASS, INVERSE CONDEMNATION, DENIAL OF CIVIL RIGHTS, CONSPIRACY, CONSUMER PROTECTION
THE NATURE CONSERVANCY, INC., a foreign corporation; COUNTY OF SAN JUAN, a municipal corporation; LINDA HENRY, DONALD WHITMILL, PATRICK ROE, individually and as County Commissioners of San Juan County; ROBERT McABEE, individually and as Director, San Juan County Planning Department; KENNETH R. MARGOLIS; SPENCE B. BEEBE; STERLING MILLER; SASHA LEEPER; LISA PETERFREUND; LINDA MORRISON; and JOHN DOES ONE through SIX,	)	
Defendants.	)	

COME NOW the Plaintiffs, CARL R. LANGE and RUBY J. LANGE, his wife, and the marital community composed thereof, and LITMAR, INC., a Washington corporation, and:

FIRST CAUSE OF ACTION

For a First Cause of Action, over and against the above-named Defendants, and each of them, jointly and severally, Plaintiffs allege as follows:

I

Plaintiffs

1.1 CARL R. LANGE and RUBY J. LANGE are, and at all times relevant hereto were, husband and wife and residents of San Juan County, Washington.

1.2 LITMAR, INC. is a corporation organized and existing under the laws of the State of Washington with its principal place of business in San Juan County, and has paid all license fees due and owing said State.

II

Defendants

2.1 THE NATURE CONSERVANCY, INC. (hereinafter referred to as "TNC") is a foreign corporation registered in the State of Washington.

2.2 LINDA HENRY, DONALD WHITMILL and PATRICK ROE were, at all times relevant hereto, individuals and residents of San Juan County, Washington and members of the Board of Commissioners of said County. (Said Defendants will hereinafter be referred to, individually and in their official capacities, as the "COMMISSIONERS").

2.3 ROBERT McABEE is, and at all times relevant hereto was, a resident of San Juan County, Washington, and the Director of the Department of Planning of said County (hereinafter referred to, individually and is his official capacity, as the "DIRECTOR").

2.4 (a) KENNETH R. MARGOLIS is, and at all times relevant hereto was, the Director of the Northwest Office of TNC.

(b) SPENCER B. BEEBE is, and at all times relevant hereto was, the "Northwest Representative" of, and the "Inventory Coordinator"

for, TNC.

(c) STERLING MILLER is, and at all times relevant hereto was, the "Inventory Team Leader" for TNC.

(d) SASHA LEEPER, LISA PETERFREUND, and LINDA MORRISON were at times relevant hereto members of the "Inventory Team" of TNC.

(e) The individuals named in sub-paragraphs (a) through (d) of this paragraph shall hereafter be referred to, individually and in their respective representative capacities, as the "INVENTORY TEAM".

2.5 JOHN DOE ONE through JOHN DOE SIX are individuals (whose names, places of residence and employment are presently unknown to Plaintiffs) who participated in the acts hereinafter alleged as employees and/or agents of SAN JUAN COUNTY and/or TNC. Plaintiffs request leave to amend this Complaint at a later date

to include such individuals upon discovery of their identity and participation.

2.6 SAN JUAN COUNTY is a municipal corporation organized and existing under the laws of the State of Washington and a legal County and subdivision of said State.

III

The Property

3.1 Plaintiffs are the owners, in fee simple absolute, of certain real property located in San Juan County more particularly described as follows:

Parcel 1: Government Lot 2, Section 17, Township 35 NR 2 W WM, EXCEPT roads; TOGETHER WITH certain tidelands in front of, adjacent to or abutting upon that portion of said Government Lot 2.

Parcel 2: The East 580 feet of Government Lot 5, Section 18, 35 NR 2 W WM, EXCEPT that portion thereof conveyed by deed recorded in

Volume 11 of Deeds, page 311, records of San Juan County, Washington.

Plaintiffs hold said property to the meander line through a chain of title commencing with the original patent issued by the United States of America prior to the time Washington became a state.

IV

The Study

4.1 Prior to May, 1974, on a date or dates presently unknown to Plaintiffs, TNC formulated a plan to examine all of the private land holdings in San Juan County for the purpose of determining which of those lands, in the opinion of TNC, were "natural areas".

4.2 Prior to May, 1974, TNC presented such plan to the DIRECTOR and/or the COMMISSIONERS. After being informed of the nature, goal, methods and extent of the plan, the DIRECTOR, and/or the COMMISSIONERS approved such plan, authorized TNC to proceed, and

and furnished (at no cost to TNC) office space in county-owned buildings together with county personnel and staff assistance.

4.3 Through the actions of the DIRECTOR and the COMMISSIONERS, the plan formulated by TNC became a policy and/or program of SAN JUAN COUNTY.

V

The Study Method

5.1 Between May, 1974 and September, 1974, the INVENTORY TEAM, together with County personnel, conducted field surveys of selected parcels of private property identified as "potential natural areas." During said filed surveys, INVENTORY TEAM members went upon the "potential natural areas". Each "potential natural area" was field-checked by one to four members of the INVENTORY TEAM and/or county personnel. "Each field visit took from a few hours to days to complete, every effort being made to walk an entire area." (Inventory, p. 8).

5.2 The persons conducting said field surveys were, at all times, authorized agents of TNC, the DIRECTOR, the COMMISSIONERS, and/or SAN JUAN COUNTY, acting within the scope of their authority and in furtherance of County policy.

VI

The Inventory

6.1 Using the information obtained, TNC and/or County personnel compiled a "review draft" and circulated it to chosen individuals, organizations and agencies on a local and nation-wide basis.

6.2 In December, 1974 and January, 1975, TNC and/or County personnel completed, printed and published their final conclusions in a document entitled "San Juan County, Washington Inventory of Natural Areas on Private Lands" dated January, 1975 (hereinafter referred to as the "Inventory").

6.3 The Inventory was circulated to the owners of the various parcels of private

property described therein, including Plaintiffs, and to selected individuals, agencies and organizations on a local and nation-wide basis.

6.4 On page 76 of said Inventory, as "Natural Area Site" Number 55, the real property owned by Plaintiffs described in Paragraph III is "described" and listed as a natural area with "high" priority for preservation.

VII.

The Inventory Recommendations

7.1 The Inventory lists and describes 57 parcels of private property as "Natural Areas" which should be preserved.

7.2 In Part IV of the Inventory entitled "Recommendations to the San Juan County Government," TNC recommends that the COMMISSIONERS and the COUNTY, inter alia:

(a) Use the Inventory as a guide in developing a comprehensive land use plan to "preserve the natu-

ral" areas described therein;

(b) Use the Inventory as a determinant for current-use assessment under the Open Space Taxation Act (RCW ch. 84.34);

(c) Use the Inventory as a guide or tool in complying with the State Environmental Policy Act (RCW ch. 43.21C);

(d) Use the Inventory as a basis for establishing a program to "preserve" the "natural areas" listed therein;

(e) Adopt a one-year moratorium on (prohibition of) any and all land use changes in the natural areas described in the Inventory; and

(f) Use the County's power to grant or deny building, subdivision and other permits to prevent any development from taking

place within the "natural" areas described in the Inventory.

7.3 The recommendations of the Inventory, developed through the aid, assistance and cooperation of all Defendants, are, in fact, a recommendation that the County prohibit development or improvement of any nature within the described areas without regard to the fact that such areas are owned by private parties.

7.4 The recommendations of the Inventory have become the policy of, and have been, and continue to be, acted upon by, the DIRECTOR, SAN JUAN COUNTY, its officers, departments, agencies and COMMISSIONERS.

VIII

Trespass

8.1 One or more members of the INVENTORY TEAM, or their agents trespassed upon Plaintiffs' property, without right or authority and specifically without the knowledge or

permission of the Plaintiffs or any one of them.

8.2 Said Acts of trespass were carried out on behalf of, and at the express direction of, TNC, the DEPARTMENT, the DIRECTOR, the COMMISSIONERS and SAN JUAN COUNTY, the persons who were at the time of said trespass acting as agents of each of said Defendants and in their respective individual capacities.

8.3 As a direct result of said trespass, TNC, SAN JUAN COUNTY, the DIRECTOR, the DEPARTMENT, and the COMMISSIONERS made and published the Inventory, listing Plaintiffs' property therein.

IX

Damage

9.1 The existence of the Inventory, its recommendations and its sponsorship and use by TNC and County officials and agencies has damaged Plaintiffs' property by rendering it unsalable, unusable and without economic value or use.

9.2 The effect of said Inventory, as alleged in the preceding paragraph, has damaged Plaintiffs in an amount equal to no less than $930,000.00 in loss of property value and in the sum of no less than $50,000.00 in mental, emotional and physical distress to the individual Plaintiffs.

SECOND CAUSE OF ACTION

For a Second Cause of Action, over and against Defendant SAN JUAN COUNTY, Plaintiffs allege as follows:

X

10.1 Plaintiffs reallege Paragraphs I through VIII hereof, inclusive, and incorporate the same herein by this reference.

XI

Inverse Condemnation

11.1 Through its acts, and as a direct and proximate result thereof, SAN JUAN COUNTY has destroyed the economic value of Plaintiffs' property and from a practical standpoint, have put the Plaintiffs out of business.

11.2 Through its acts, and as a direct and proximate result thereof, SAN JUAN COUNTY has deprived Plaintiffs of any and all beneficial use of their property.

11.3 The damage inflicted upon Plaintiffs' property by the aforesaid actions of SAN JUAN COUNTY and its officers and/or agents is such that, in justice and fairness, the burden thereof should be on the public and not on the Plaintiffs.

11.4 At no time has SAN JUAN COUNTY or any other Defendant offered to pay Plaintiffs for the damages and/or losses so caused or any part thereof.

11.5 Said acts and their results constitute an inverse condemnation of Plaintiffs' property. The cumulative actions of SAN JUAN COUNTY and/or its agents evidences its unequivocal intention to take Plaintiffs' property.

11.6 The actions of SAN JUAN COUNTY constitute a taking of Pla tiffs' property without just compensation in violation of

Amendment V of the Constitution of the United States and/or a taking or damaging of Plaintiffs' property in violation of Article I, Sec. 16, of the Constitution of the State of Washington.

XII

Damage

12.1 The fair market value of Plaintiffs' property subjected to said inverse condemnation, taking and/or damaging was, at the time thereof, no less than $930,000.00 and Plaintiffs have been damaged in said amount.

THIRD CAUSE OF ACTION

For a Third Cause of Action, over and against Defendants SAN JUAN COUNTY, the DEPARTMENT, the DIRECTOR, and the COMMISSIONERS, jointly and severally, Plaintiffs allege as follows:

XIII

13.1 Plaintiffs reallege Paragraphs I through VII hereof, inclusive, and incorporate the same herein by this reference.

XIV

S.E.P.A.

14.1 The acts of SAN JUAN COUNTY, the DIRECTOR, the DEPARTMENT and the COMMISSIONERS alleged herein, including but not limited to:

(a) the authorization of the study;

(b) the assistance with, and participation in the study;

(c) the preparation and distribution of the Inventory; and

(d) the implementation of the Inventory;

constitute a major nonduplicative action, and/or separate major nonduplicative actions, significantly affecting the environment for which an environmental impact statement is required.

14.2 At no time have the Defendants, or any of them, complied with the requirements of the State Environmental Policy Act (RCW ch. 43.21C).

XV

Injunction

15.1 SAN JUAN COUNTY and all of its departments, agencies, officials, employees and agents should be enjoined from using the Inventory in any way and/or implementing, in whole or in part, any of the recommendations of said Inventory prior to full compliance with RCW ch. 43.21C.

FOURTH CAUSE OF ACTION

For a Fourth Cause of Action, over and against Defendants the DIRECTOR, KENNETH R. MARGOLIS, SPENCER B. BEEBE, STERLING MILLER, the COMMISSIONERS, SASHA LEEPER, LISA PETERFREUND, LINDA MORRISON, and JOHN DOE ONE through JOHN DOE SIX, jointly and severally, Plaintiffs alleges as follows:

XVI

16.1 Plaintiffs reallege Paragraphs 1 through VII hereof, inclusive, and incorporate the same herein by this reference.

XVII

Civil Rights

17.1 Plaintiffs CARL R. LANGE and RUBY J. LANGE, as citizens and individuals resident within the State of Washington and the United States of America, are entitled to all the rights, privileges and immunities granted to, or reserved by, the people, including, inter alia:

(a) The right to privacy;

(b) The right to be secure in their persons, houses, papers and effects, against unreasonable searches and/or seizures;

(c) The right to equal protection of the laws;

(d) The right to freedom from deprivation of life, liberty or property without due process of law;

(e) The right to freedom from deprivation of property without just compensation.

XVIII

Violation of Civil Rights

18.1 Both the trespass upon, and search of, Plaintiffs' property constitute a violation of Plaintiffs' rights to privacy and the right to be secure from unreasonable searches and seizures.

18.2 The process of compiling and disseminating the Inventory, its adoption as County policy, and/or the methods used in relation thereto, constitute a violation of Plaintiffs' right to equal protection of the law, and/or to due process of law.

18.3 The dissemination of the Inventory and/or its adoption as County policy constitutes a violation of Plaintiffs' right not to have their property taken without due process of law.

18.4 The publication of the Inventory and/or its adoption as County policy constitute an unconstitutional seizure of Plaintiffs' property.

XIX

Color of Law

19.1 The Defendants named in the preamble to this Fourth Cause of Action individually, through agents, and/or as agents of one or more of the other Defendants, did one or more of the acts constituting one or more violations of Plaintiffs' civil rights.

19.2 The said acts of said Defendants were carried out without authority under color of state law, to-wit: The Planning Enabling Act (RCW ch. 36.70), the Planning Commission Act (RCW ch. 35.63), the Shoreline Management Act (RCW ch. 90.58), and/or various County ordinances adopted pursuant to or independent of said State Acts.

XX

42 USC §1983

20.1 The said acts of said Defendants, carried out under color of state law, subjected and continue to subject Plaintiffs to a deprivation of Plaintiffs' rights, privileges, and/

or immunities secured by the Constitution and/or laws of the United States.

20.2 The Defendants named in the preamble to this Fourth Cause of Action are therefore liable to Plaintiffs pursuant to 42 USC §1983, for damages to Plaintiffs caused thereby.

XXI

Damages

21.1 The said deprivation of Plaintiffs' civil rights caused damage to Plaintiffs in an amount equal to no less than $930,000.00.

FIFTH CAUSE OF ACTION

For a Fifth Cause of Action over and against each and all of the Defendants, jointly and severally, Plaintiffs allege as follows:

XXII

22.1 Plaintiffs reallege Paragraphs I through VII, inclusive, XVII and XVIII hereof and incorporate the same herein by this reference.

XXIII

Conspiracy to Deprive Civil Rights

23.1 Defendants, TNC, the DIRECTOR,

KENNETH R. MARGOLIS, SPENCER B. BEEBE, STERLING MILLER, the INVENTORY TEAM, the COMMISSIONERS and JOHN DOES ONE through SIX did plan and conspire together to take the actions alleged herein which deprived Plaintiffs of their aforesaid Constitutional rights.

23.2 One or more of said Defendants did, in furtherance of the object of said conspiracy, take or do certain overt acts, including but not limited to:

(a) Physical trespass on Plaintiffs' property;

(b) Compilation of data;

(c) Distribution of draft inventories;

(d) Distribution of the Inventory;

(e) Adoption (formally or informally) of the Inventory as County policy; and

(f) Use of the Inventory in making administrative and legislative decisions at the County level.

XXIV

42 USC §1985

24.1 Pursuant to 42 USC §1985, Plaintiffs have a cause of action over and against each of said Defendants for the injury and/or damages caused by said deprivation.

24.2 Said deprivation caused Plaintiffs' injury and/or damages in an amount equal to no less than $930,000.00.

SIXTH CAUSE OF ACTION

For a Sixth Cause of Action over and against the DIRECTOR and the COMMISSIONERS, jointly and severally, Plaintiffs allege as follows:

XXV

25.1 Plaintiffs reallege Paragraphs I through VII, inclusive, XVII, XVIII and XXIII hereof and incorporate the same herein by this reference.

XXVI

Failure to Prevent Deprivation of Rights

26.1 Each of the Defendants named in the preamble of this Sixth Cause of Action, at all

times relevant hereto, knew of the plan and conspiracy alleged on Paragraph XXIII hereof.

26.2 Each of the Defendants named in the preamble to this Sixth Cause of Action have, and at all times relevant hereto had, requisite power, authority and duty to prevent, or to aid in the prevention of, the said deprivation of Plaintiffs' rights.

26.3 Contrary to their individual and/or collective duties, the said Defendants failed to prevent, or to attempt to prevent, or to aid in the prevention of, said deprivation of Plaintiffs' rights, but instead approved of and participated in said deprivation.

XXVII

42 USC §1986

27.1 Pursuant to 42 USC §1986, Plaintiffs have a cause of action over and against each of the Defendants named in the preamble to this Sixth Cause of Action, jointly and severally, for all damages caused by their failure to prevent or aid in the prevention of

the deprivation of Plaintiffs' civil rights.

27.2 As a direct result of said Defendants' failure to act, either individually or jointly, Plaintiffs have been damaged in an amount equal to no less than $930,000.00.

SEVENTH CAUSE OF ACTION

For a Seventh Cause of Action over and against TNC, Plaintiffs allege as follows:

XXVIII

Unfair Practice in Trade or Commerce

29.1 The sale and purchase of real property is "trade" and "commerce" as defined in RCW ch. 19.86.

29.2 As shown in the Inventory (particularly Appendix H), TNC is engaged in the sale and purchase of real property.

29.3 Through its actions of planning, compiling, preparing and publishing the Inventory, and through its obtaining the assistance of SAN JUAN COUNTY and its officials and agents, TNC has engaged in an unfair practice in trade or commerce in violation of RCW 19.86.020.

29.4 Said violation has caused Plaintiffs' real property to lose all or a substantial portion of its value by creating an artificial market wherein TNC would be the only willing buyer and Plaintiffs, not being able to develop or improve their property, would be forced to dispose of it at whatever price TNC might offer.

XXX

Restraint of Trade - Monopoly

30.1 Plaintiffs reallege Paragraph XXIII hereof and incorporate the same herein by this reference.

30.2 By said conspiracy, TNC intended, in violation of RCW 19.86.030, to restrain and monopolize the trade in real property in San Juan County having "natural" values, obtaining for itself the position of being the only possible buyer for said properties.

30.3 Said acts of TNC constitute an attempt, in violation of RCW 19.86.040, to monopolize the trade in real property in San Juan County having "natural" values.

XXXI

Damages

31.1 Said acts and conspiracy of Defendant TNC has caused Plaintiffs to be injured or damaged in their trade, business and/or property in an actual amount equal to no less than $930,000.00.

31.2 Pursuant to RCW 19.86.090, the court may;

(a) Increase the award of damages to an amount up to three times actual damages;

(b) Award Plaintiffs their costs of suit, including a reasonable attorney's fee; and

(c) Enjoin any further violations by said Defendant.

WHEREFORE, Plaintiffs pray for judgment as follows:

1. In Plaintiffs' First Cause of Action, over and against Defendants TNC, the COMMIS-

SIONERS (individually and in their official capacity), the DIRECTOR (individually and in his official capacity), the INVENTORY TEAM (individually and in their respective capacities as agents of TNC and/or SAN JUAN COUNTY), JOHN DOES ONE through SIX, and SAN JUAN COUNTY, jointly and severally, in the sum of no less than $930,000.00 for loss of property value and an additional $50,000.00 for personal injuries.

2. In Plaintiffs' Second Cause of Action, over and against Defendant SAN JUAN COUNTY in the sum of no less than $930,000.00.

3. In Plaintiffs' Third Cause of Action, over and against Defendants SAN JUAN COUNTY, the DEPARTMENT, the DIRECTOR and the COMMISSIONERS, enjoining said Defendants, or any of them or any person acting thereunder or in concert therewith from adopting and/or continuing use of, the Inventory as County policy and/or in official acts, considerations or decisions.

4. In Plaintiffs' Fourth Cause of Action, over and against Defendants the DIRECTOR, the COMMISSIONERS, the INVENTORY TEAM (individually and in their respective capacities), jointly and severally, in the sum of no less than $930,000.00.

5. In Plaintiffs' Fifth Cause of Action, over and against each and all of the Defendants, jointly and severally, in the sum of no less than $930,000.00.

6. In Plaintiffs' Sixth Cause of Action, over and against Defendants the DIRECTOR and the COMMISSIONERS (both individually and in their respective official capacities), jointly and severally, in the sum of no less than $930,00.00.

7. In Plaintiffs' Seventh Cause of Action, over and against Defendant TNC:

(a) For actual damages, in the amount of no less than $930,000.00;

(b) That said actual damages awarded be trebled and judgment be awarded

in said trebled amount;

(c) Enjoining said Defendant from engaging in further violation of RCW ch. 19.86; and

(d) For Plaintiffs' court costs, including a reasonable attorney's fee.

8. For such other and further relief as the Court deems just.

DATED this _____ day of _____, 1975.

WILLIAM V. VETTER
Attorney for Plaintiffs

705 White-Henry-Stuart Bg.
Seattle, WA 98101
622-9962

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SAN JUAN COUNTY

CARL R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington corporation,	)	
Plaintiffs,	)	NO. 3117
vs.	)	
THE NATURE CONSERVANCY, INC., a foreign corporation; COUNTY OF SAN JUAN, a municipal corporation; LINDA HENRY, DONALD WHITMILL, PATRICK ROE, individually and as County Commissioners of San Juan County; ROBERT McABEE, individually and as Director, San Juan County Planning Department; KENNETH R. MARGOLIS; SPENCE B. BEEBE; STERLING MILLER; SASHA LEEPER; LISA PETERFREUND; LINDA MORRISON; AND JOHN DOES ONE through SIX,	)	ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL OF PLAINTIFFS' FIRST CAUSE OF ACTION AND PLAINTIFFS' FOURTH AND FIFTH CAUSES OF ACTION WITH REGARD TO INVASION OF PRIVACY AND/OR UNREASONABLE SEARCH AND SEIZURE IN FAVOR OF DEFENDANTS THE NATURE CONSERVANCY, MARGOLIS AND BEEBE
Defendants.	)	

THIS MATTER having come on regularly for hearing on the 20th day of July, 1977, before the undersigned Judge of the above-entitled Court upon the Motion of Defendants The Nature Conservancy, Kenneth R. Margolis and Spence B.

Beebe, for an order granting summary judgment, all parties being present in Court by their respective counsel, and the Court having considered the records and files herein, including the depositions and affidavits on file herein, and having heard the argument of counsel, and being fully advised in the premises and having found further that there is no just reason to delay the entry of judgment, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the Motion of Defendants The Nature Conservancy, Kenneth R. Margolis and Spence B. Beebe for an order granting summary judgment of dismissal is hereby granted with regard to: (1) Plaintiffs' first cause of action, trespass, the Court having found that reasonable men could reach only the conclusion that there was no trespass, and (2) Plaintiffs' fourth and fifth causes of action to the extent that they allege invasion to privacy and/or unreasonable search and seizure. It is further

ORDERED, ADJUDGED AND DECREED that as to Defendants The Nature Conservancy, Kenneth R. Margolis and Spence B. Beebe, the first cause of action of Plaintiffs' Complaint, and the fourth and fifth causes of action of Plaintiffs' Complaint, insofar as they allege invasion of privacy and/or unreasonable search and seizure, are dismissed with prejudice.

DATED this 1st day of September, 1977.

/s/ Dennis J. Britt
J U D G E

Presented by:

DETELS, DRAPER & MARINKOVICH

By: _____
ERIC L. FREISE
Attorneys for Defendants The Nature Conservancy, Margolis & Beebe

COPY RECEIVED AND NOTICE OF PRESENTATION WAIVED BY:

Copy received only
WILLIAM V. VETTER
Attorney for Plaintiffs

_____
OWEN A. JOHNSON
Attorney for Defs. San Juan County and San Juan County Commissioners

MICHAEL C. REDMAN
Prosecutor, San Juan County

JOHN B. NASON
Attorney for Defendants San Juan County, Donald C. Whitmill, Linda Henry, Robert R. McAbee and Patrick C. Roe

VINCENT R. LARSON
Attorney for Defendants The Nature Conservancy and Linda Henry, individually

JOHN CUNNINGHAM
Attorney for Defendant Patrick C. Roe, Individually

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SAN JUAN COUNTY

CARL R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington corporation, Plaintiffs, vs. THE NATURE CONSERVANCY, INC., a foreign corporation; COUNTY OF SAN JUAN, a municipal corporation; LINDA HENRY, DONALD WHITMILL, PATRICK ROE, individually and as County Commissioners of San Juan County; ROBERT McABEE, individually and as Director, San Juan County Planning Department; KENNETH R. MARGOLIS; SPENCE B. BEEBE; STERLING MILLER; SASHA LEEPER; LISA PETERFREUND; LINDA MORRISON; and JOHN DOES ONE through SIX, Defendants.	NO. 3117 ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL OF PLAINTIFFS' FIRST CAUSE OF ACTION & PLAINTIFFS' FOURTH & FIFTH CAUSES OF ACTION WITH REGARD TO INVASION OF PRIVACY AND/OR UNREASONABLE SEARCH & SEIZURE IN FAVOR OF DEFENDANTS COUNTY OF SAN JUAN, LINDA HENRY & DONALD WHITMILL, individually and as County Commissioners of San Juan County; PATRICK ROE as San Juan County Commissioner; ROBERT McABEE, individually & as Director, San Juan County Planning Department

THIS MATTER having come on regularly for hearing on the 20th day of July, 1977, before the undersigned Judge of the above-entitled Court upon the motion of Defendants San Juan

County, Linda Henry, Donald Whitmill, Patrick Roe and Robert McAbee, for an order granting summary judgment, all parties being present in Court by their respective counsel, and the Court having considered the records and files herein, including the depositions and affidavits on file herein, and having heard the argument of counsel, and being fully advised in the premises, and having found further that there is no just reason to delay entry of judgment, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the motions of the Defendants, County of San Juan, Linda Henry, Donald Whitmill, Patrick Roe and Robert McAbee, for an order granting summary judgment of dismissal is hereby granted with regard to: (1) Plaintiffs' First Cause of Action, trespass, the Court having found that reasonable men could reach only the conclusion that there was no trespass; and (2) Plaintiffs' Fourth and Fifth Causes of Action to the extent that they allege invasion to privacy and/or

unreasonable search and seizure; and it is further

ORDERED, ADJUDGED AND DECREED that as to defendants, County of San Juan, Linda Henry and Donald whitmill, individually and as County Commissioners of San Juan County, Patrick Roe as County Commissioner of San Juan County, Robert McAbee individually and as Director of San Juan County Planning Department, the First Cause of Action of Plaintiffs' Complaint, and the Fourth and Fifth Causes of Action of Plaintiffs' Complaint, insofar as they allege invasion of privacy and/or unreasonable search and seizure, are hereby dismissed with prejudice.

DATED this 1st day of September, 1977.

/s/ Dennis J. Britt
J U D G E

Presented by:

OWEN A. JOHNSON
Attorney for San Juan County, Donald Whitmill, Linda Henry, Patrick Roe and Robert McAbee

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SAN JUAN COUNTY

CARL R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington corporation,	)	
Plaintiffs,	)	NO. 3116
vs.	)	
THE NATURE CONSERVANCY, INC., a foreign corporation; COUNTY OF SAN JUAN, a municipal corporation; LINDA HENRY, DONALD WHITMILL, PATRICK ROE, individually and as County Commissioners of San Juan County; ROBERT McABEE, individually and as Director, San Juan County Planning Department; KENNETH R. MARGOLIS; SPENCE B. BEEBE; STERLING MILLER; SASHA LEEPER; LISA PETERFREUND; LINDA MORRISON; and JOHN DOES ONE through SIX,	)	ORDER GRANTING SUMMARY JUDGMENT
Defendants.	)	

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court upon the motion of the Defendant PATRICK ROE in his individual capacity for an order granting summary judgment,

all parties having been present in Court by their respective counsel on the 20th day of July, 1977 and the Court having considered the records and files herein and the affidavit of PATRICK C. ROE and heard the argument of all counsel thereon, and being further fully advised in the premises, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the Defendant PATRICK ROE'S motion for summary judgment requesting an order dismissing the above-entitled action as to said Defendant individually be and hereby is granted. It is further

ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Complaint as to the Defendant PATRICK ROE in his individual capacity is hereby dismissed with prejudice.

DONE IN OPEN COURT this _____ day of _____, 1977.

/s/ Dennis J. Britt
J U D G E

Presented by:

BANNISTER, BRUHN & CUNINGHAM

BY: /a/ JOHN R. CUNINGHAM
JOHN R. CUNINGHAM
Attorneys for Patrick Roe,
Individually

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SAN JUAN COUNTY

CARLE R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington corporation, Plaintiffs, vs. THE NATURE CONSERVANCY, INC., a foreign corporation, et al., Defendants.	NO. 3 1 1 7 SUPPLEMENTAL MEMORANDUM DECISION REGARDING ATTORNEY FEES AND COSTS

I have reviewed all of the motions, affidavits, memorandums and itemizations of hours, rates, costs and disbursements, and Mr. Vetter's letter of September 28, 1977. Additionally, I have read the various cases cited by counsel interpreting and applying 42 USCA Sec. 1988. These cases uniformly hold that this Act applied to all cases which are pending on October 19, 1976, the effective date of the Act, on the basis that such was clearly the congressional intent. Several of the cases specifically cite por-

tions of the congressional record as evidence of such intent. While cases, such as Rodriguez vs. Jimenez, 551 F.2d 877, discuss certain rationale for such "congressional intent," such discussions do not in any fashion qualify the clear congressional intent.

None of the cases cited or reviewed disclose any basis upon which I could hold that Section 1988 is inapplicable to this case and, therefore, I must hold that pursuant to Section 1988, an award of attorney fees to the prevailing parties herein is authorized by Section 1988 and is discretionary with the Court.

I further feel that an award of attorney fees to the prevailng parties herein is well justified and, in addition, I am inclined to believe that a denial thereof could well be determined an abuse of discretion.

I have taken into consideration the standards applicable to the award of attorney fees cited by counsel, and based thereon feel

that an award of substantial attorney fees is warranted herein. It must be remembered that the form of the Complaint, the designation of causes of action, the identification of defendants and their respective capacities, and the relief sought against each of them, was at all times under the sole and exclusive control of the plaintiffs herein. Under such circumstances, while I feel that some allocations of time, costs and fees should be made as to those causes of action which fall within Section 1988 and those which do not, I cannot impose upon the defendants the burden of making such allocation with mathematical precision. Given the novelty and complexity of the issues raised by the causes alleged under the Federal statutes, an allocation of costs and fees in direct proportion to the number of causes of action would not be appropriate.

Inasmuch as my involvement in this matter was not directly caused by any individual participant and that the scheduling of hear-

ings in Snohomish County was done both for the benefit of the Court and counsel, I feel it inappropriate to award the amounts claimed for travel expenses.

The out-of-pocket costs and disbursements should properly be apportioned equally to those causes under the Federal civil rights statutes and the remaining causes of action. I will, therefore, award to each of the defendants judgment for 50% of their costs incurred. I am further persuaded that it would be reasonable to allocate 60% of the time and fees claimed to those causes of action under Federal civil rights statutes and the balance to the remaining causes of action. I will, therefore, award to each of the defendants 60% of the fees claimed.

I am unable to reconcile the figure of $8,927.50 found in Paragraph 2 of the proposed Order Granting Defendants' Motions for Summary Judgment with the affidavits and statements of fees earlier filed herein and have, therefore,

amended said paragraph accordingly.

I do specifically find that the rates per hour and the total hours expended by the various counsel herein were reasonable and necessary when considered in light of all twelve of the factors for the Court's consideration set forth on Page 4 of Plaintiffs' Memorandum in Opposition to Requests for Attorneys' Fees. A copy of this decision and the Order Granting Defendants' Motions for Summary Judgment entered this date should be mailed to all counsel of record.

I am this date returning the original file to the San Juan County Clerk and, therefore, all original documents should hereafter be sent to her for filing.

DATED this 7th day of October, 1977.

/s/ Dennis J. Britt
J U D G E, DENNIS J. BRITT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SAN JUAN COUNTY

CARL R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington corporation,	)	
Plaintiffs,	)	NO. 3 1 1 7
vs.	)	
THE NATURE CONSERVANCY, INC., a foreign corporation, et al.,	)	ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
Defendants.	)	

THIS MATTER having come before the Court on July 20, 1977, on the various Defendants' motions for summary judgment and having further come before the Court on September 1, 1977, on the various Defendants' motions for reconsideration of the Court's oral order of July 20, 1977; and the parties having been represented at each hearing by their respective attorneys of record; and the Court having read and considered the various memoranda and affidavits submitted by the various parties; and the Court having heard and having consid-

ered the theory of common law liability raised in Plaintiffs' Memorandum Re Motions for Reconsideration, and having considered the arguments of counsel for the various parties; and having considered and denied Plaintiffs' Motion for Clarification and Motion for Leave to File Amended Complaint; and being otherwise fully advised in the premises; and

The Court having heretofore announced its oral decision that there is no genuine issue of material fact, and Defendants are severally entitled to judgment as a matter of law as to each and any claim arising out of Plaintiffs' Complaint, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that, as to each, every and any claim arising out of Plaintiffs' Complaint, the several motions of the various Defendants for Summary Judgment are hereby GRANTED and the Plaintiffs' Complaint is hereby dismissed with prejudice. It is further

ORDERED, ADJUDGED AND DECREED that, pur-

suant to 42 U.S.C. 1988, the Defendants are hereby awarded judgment against the Plaintiffs for the reasonable fees and expenses of defense counsel as follows:

1. Defendants The Nature Conservancy, Spencer Beebe and Kenneth R. Margolis, on their motion for award of $18,848.01, are hereby granted judgment against Plaintiffs jointly and severally in the amount of $10,945.87.

2. Defendants County of San Juan and Linda Henry, Donald Whitmill, and Patrick Roe, as County Commissioners, and Robert McAbee, individually and as Director of San Juan County Planning Department, on their motion for award of $8,627.80 are hereby granted judgment against Plaintiffs jointly and severally in the amount of $5,069.74.

3. Defendant Linda Henry, in her individual capacity, on her motion for award of $911.85, is hereby granted judgment against Plaintiffs jointly and severally in the amount of $544.18.

DATED this 7th day of October, 1977.

/s/ Dennis J. Britt
J U D G E

Presented by:

Detels, Draper & Marinkovich
Riddell, Williams, Ivie,
Bullitt & Walkinshaw

BY: _____
Vincent R. Larson
Attorneys for The Nature Conservancy
and Linda Henry, Individually

Approved and Notice of
Presentation Waived:

_____
William V. Vetter
William L. Williams
Attorneys for Plaintiffs

_____
Owen A. Johnson
John Nason
Attorneys for County of San Juan,
et al.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CARL R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington Corporation, Appellants, vs. THE NATURE CONSERVANCY, INC., a foreign corporation; et al., Respondents.	)	NO. 45140 BRIEF OF APPELLANTS

At pp. 4-6:

ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR

1. Is there a genuine issue of fact as to whether or not TNC and San Juan County, or their respective agents, jointly undertook and/or pursued a course of action with the goal of identifying and preserving private lands in San Juan County having features desirable to TNC, a private corporation engaged in the buying and selling of real property?

2. Is there a genuine issue of fact as

to whether an agent of TNC and/or San Juan County entered upon Langes' property for the purposes of the Inventory process?

3. Is there a genuine issue of fact as to whether the actions, publications, announcements, etc., of TNC and/or San Juan County have: (a) deprived the Langes of any or all beneficial use of their properties; (b) "taken" or "damaged" those properties without just compensation; (c) created a cloud upon the title to those properties; (d) deprived the Langes of any one of their constitutional rights; and/or (e) otherwise injured them.

4. Is there a genuine issue of law as to whether TNC engaged in activities designed to monopolize, or create other unfair advantage(s) for itself, in the real estate market in San Juan County?

5. Are the Respondents entitled to an award of substantial attorney fees pursuant to the federal Civil Rights Attorneys Fees Act of 1976 (42 USC §1988)?

6. Can a county delegate, without guidelines, its responsibility for determining the location of natural physical features in the county to a private entity whose purpose it is to preserve, by acquisition or otherwise, such areas?

7. Might reasonable men conclude that TNC and San Juan County and/or their respective agents, entered into, and pursued, a conspiracy to prevent further development on private lands having features TNC desired to preserve?

8. Might reasonable men conclude that the cooperative and concerted actions of the Respondents, in toto, constitute a deliberate and intentional circumvention of mandated procedures for regulating land use and that those actions injured Appellants?

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

CARL R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington corporation,	)	
Appellants,	)	NO. 7004-45140-I
vs.	)	DIVISION ONE
THE NATURE CONSERVANCY, INC., a foreign corporation; COUNTY OF SAN JUAN; LINDA HENRY, DONALD WHITMILL and PATRICK C. ROE, individually and as County Commissioners of San Juan County; ROBERT R. McABEE, individually and as Director, San Juan County Planning Department; KENNETH R. MARGOLIS; and SPENCER B. BEEBE,	)	
Respondents,	)	
and	)	
STERLING MILLER; SASHA LEEPER; LISA PETERFREUND; LINDA MORRISON; and JOHN DOE ONE through SIX,	)	
Defendants.	)	FILED OCT. 8, 1979

SWANSON, A.C.J. -- Carl and Ruby Lange and Litmar, Inc. appeal from adverse summary

judgments in a dispute arising out of the inclusion of their San Juan Island property in an "Inventory of Natural Areas on Private Lands" prepared by The Nature Conservancy, Inc. with the aid of various San Juan County officials. We find no error and affirm.

The Nature Conservancy (TNC) is a private, nonprofit, scientific organization devoted to the identification and protection of natural environs. TNC's Northwest office planned an "Inventory of Natural Areas on Private Lands, San Juan County, Washington." Through the Inventory, TNC hoped to identify unique, privately held areas, alert owners to their ecological significance and potential methods of preservation, and provide state and county governments scientific data for land use planning purposes. The San Juan County Planning Department, when informed of TNC's plans, decided the Inventory would benefit the county in making land use policy decisions and offered TNC office space, secretarial help,

and further cooperative aid. Using public records and existing literature and field studies, the Inventory team compiled a list of approximately 75 potentially significant natural areas between May and December of 1974.

In January of 1975, TNC published the Inventory, listing 57 natural areas, describing each area's natural characteristics, and identifying uses compatible with those characteristics. The Inventory also contained "recommendations to the San Juan County government" and "implementation techniques" regarding private and public methods of protecting natural areas. TNC presented the Inventory to the San Juan County Commissioners and the San Juan County Planning Department on March 17, 1975. At no time has the County adopted or taken other official actions regarding the Inventory.

The subject property consisted of an island, a gravel tombolo exposed at low tide, contiguous portions of San Juan Island and

and adjacent tidelands, named "Minnesota Reef," in the Inventory and owned by the Langes in part since 1961. In 1973, the Langes took up permanent residence in a summer cabin on the property and started construction of a new home. In addition, the Langes envisioned beginning a "pilot" aquaculture project involving seaweed farming and marine research laboratories. In April, 1975, when the permanent residence was about half finished, the Langes received by mail a copy of TNC's Inventory, identifying their property as having high priorities for preservation in its natural state. Thereafter, the Langes stopped work on the new house and abandoned the plans to develop an aquaculture project.

The Langes filed suit in August, 1975, alleging a myriad of causes of action against some and all named defendants, including common-law trespass, deprivation of rights in violation of 42 USC §1973, conspiracy to deprive Plaintiffs equal protection of the laws

in violation of 42 USC §1985, violation by TNC of RCW 19.86 (unfair trade practice and monopolization of trade), and violations of SEPA and inverse condemnation by San Juan County and its officials. Defendants moved for summary judgment. On July 20, 1977, the trial court granted a partial summary judgment. Following hearing of defendants' motion for reconsideration, summary judgment was granted as to the remaining causes of action.

The Langes assign numerous errors. We note at the outset of discussion that in reviewing a summary judgment the function of this court is "to determine whether a genuine issue of fact exists, not resolve the issue." Ashcraft v. Wallingford, 17 Wn.App. 853, 854, 565 P.2d 1224 (1977). In so doing, we shall "consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the [Langes]." Highline School Dist. v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976).

The first specific alleged error concerns the question of trespass. The trial court held reasonable persons could not conclude that respondents or their agents entered upon the subject property. The Langes argue such constituted a weighing of the relative credibility of the proffered evidence, a function properly within the domain of the jury. The Langes rely on statements in a letter and the Inventory which allegedly established that their property was subject to a "field check." The deposition of Charles Eaton, however, establishes without contradiction that he was the sole TNC agent involved in the study of Minnesota Reef, that he relied exclusively upon the 1968 study by one Susan Heller, and that he went upon the Langes' property only once, in 1974, prior to his association with TNC and with the permission of the Langes. There is simply no evidence of an unauthorized entry upon the Langes' property by anyone connected with the Inventory.

The Langes next argue the trial court erroneously granted summary judgment as regards their claimed inverse condemnation rights.

> To maintain an inverse condemnation suit for damages . . . the property owner must allege interference with the use and enjoyment of his land and a resulting loss in market value.

Highline School Dist. at 14. The Langes contend depositions before the trial court established interference with the subject property and that a question of fact thus exists regarding the balancing of public interest in interfering with the property and the interests of the property owner. See Department of Ecology v. Pacesetter Constr. Co., 89 Wn.2d 203, 571 P.2d 196 (1977); Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wn.2d 726, 731, 565 P.2d 1162 (1977).

It is difficult to ascertain the basis for such an argument for nothing in the record supports the assumption that the subject property has suffered a taking or damages. At no

point has the county expressed any interest in acquiring the subject property. The Inventory standing alone carries no legal weight. Even had the county officially adopted the Inventory in some manner, the Langes would be hard pressed to demonstrate any interference with the enjoyment or use of their property, as the Inventory recommends that "no restricted use thereof is necessary. . . ." It is immaterial that the Langes discontinued construction of a new home and abandoned plans for certain aquaculture project, for such actions were voluntary and in no way required by county action.

The Langes alleged three causes of action under the Civil Rights Act, 42 USC §§ 1981-88, the first of which relies upon 42 USC §1983, which reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States. . .to the deprivation of any rights, privileges, or immun-

> ity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Langes contend that the county, in the course of supporting TNC, denied the Langes any opportunity to be heard regarding, or even to be cognizant of, the compilation of the Inventory. This, they contend, established a cause of action for denial of due process under the color of state action. We cannot agree.

The Langes offer no applicable authority, and we can find none, to support the proposition that public hearings must be held before a governmental body may participate in an information gather process. Absent some deprivation of a constitutional right, no cause of action inures under §1983.

The Langes further rely on §1985 of the Civil Rights Act, which provides means of recovery for the victim of a conspiracy inten-

ded to deprive "any person or class of persons of the equal protection of the laws," and §1986 thereof, which grants a cause of action against persons empowered to prevent violations of §1985, of which they are aware who do not do so. The Langes contend they are members of a class--owners of scenic and natural property--discriminated against by the actions of TNC and the county. The Langes fail, however, to demonstrate either a conspiracy, or a class-based animus, or how they now enjoy less than equal protection of the law. The Langes argue only that because their property may become "preserved" their rights will be less than those of owners of "ordinary" property. Such conclusive reasoning cannot of itself create a cause of action. The §1986 allegation suffers the same deficiencies.

The Langes also charge TNC with attempting to create a captive market in which to acquire the subject property by limiting the property's uses. Thus, they argue, a cause of action

exists under RCW 19.86 for monopolization and unfair competition. Beyond the fact, as discussed above, that no restrictions on the use of the subject property have resulted from compilation or publication of the Inventory, it is well established that an individual, and thus TNC, has a First Amendment right to try to influence government action. See Eastern R. R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961); Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972).

Finally, the Langes argue that the presentation of this case at trial in the form of specific legal theories obscured "the basic issue." Discussion of this "issue" revolves primarily around the history and law of the "taking" clause. This issue is presented and resolved with mention of the theory of inverse condemnation.

An award of attorneys' fees granted by the trial court is disputed by the Langes as

being improperly itemized. The trial court took cognizance of the propriety of awards under 42 USC §1988 and concluded an award proper. We agree. We further hold an award of fees appropriate on appeal pursuant to RAP 18.1 and 42 USC §1988, in the amount of $3,500.00. See Meyer v. Missouri State Highway Comm'n, 567 F.2d 804 (8th Cir. 1977); Kutzka v. California State College, 564 F.2d 108 (3d Cir. 1977); Equal Employment Opportunity Comm'n v. Datapoint Corp., 412 F. Supp. 406 (W.D. Tex. 1976).

The trial court is affirmed in full.

/s/ Swanson, A.C.J.

WE CONCUR:

CALLOW, C.J. WILLIAMSON, J.

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

CARL R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington corporation,	)	
Appellants,	)	NO. 7004-45140-I
vs.	)	
THE NATURE CONSERVANCY, INC., a foreign corporation; COUNTY OF SAN JUAN; LINDA HENRY, DONALD WHITMILL and PATRICK C. ROE, individually and as County Commissioners of San Juan County; ROBERT R. McABEE, individually and as Director, San Juan County Planning Department; KENNETH R. MARGOLIS; and SPENCER B. BEEBE,	)	ORDER DENYING MOTION FOR RECONSIDERATION
Respondents,	)	
and	)	
STERLING MILLER; SASHA LEEPER; LISA PETERFREUND; LINDA MORRISON; and JOHN DOE ONE through SIX,	)	
Defendants.	)	

The appellants, Carl R. Lange and Ruby J. Lange, his wife, and Litmar, Inc., having filed their motion for reconsideration herein,

and the Court having determined that it should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same hereby is, denied.

DATED this 29th day of November, 1979.

/s/ Keith M. Callow
Chief Judge

THE SUPREME COURT
STATE OF WASHINGTON
OLYMPIA
98504

February 22, 1980

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Route 2, Box 3236
Lopez, WA 98261

Mr. Owen A. Johnson
801 Dexter Horton Building
Seattle, WA 98104

Mr. John Cunningham
415 Pine
Mount Vernon, WA 98273

Counsel:

Re: Supreme Court No. 46758 - Lange, et al. v. The Nature Conservancy, Inc., et al.
Court of Appeals No. 7004-I-5

Following consideration of the above entitled Petition for Review on February 22, 1980, the following notation order was entered on page 250, Volume 1, of the petition for review docket:

"DENIED"

/a/ ROBERT F. UTTER
Chief Justice

Very truly yours,

JOHN J. CHAMPAGNE
Clerk

JJC:et

cc: Court of Appeals, Div. I

THE NATURE CONSERVANCY
NORTHWEST OFFICE

1234 N.W. 25th Avenue
Portland, OR 97210
(503) 228-9561

July 20, 1973

Mr. John Black
Box 27
Orcas Island, WA 98280

Dear John:

It was a great pleasure to meet and talk with you last weekend and to learn that the San Juan County Planning Department is in such capable hands. I did feel bad that your presentation was interrupted, especially since you obviously had people very interested. Dave Black was signalling frantically to me that we had to keep as close as possible to our prearranged lunch schedule. When I interrupted you, I hoped that you would simply be able to continue after people brought their lunches back to the meeting room. I am sorry it didn't work out that way. Nevertheless, I felt we had a pretty successful meeting, and that your presentation was an important part of it. Thank you.

I think the potential for cooperation between the Conservancy and the County around the issues of land conservation and open space and recreational planning are very exciting. At the moment I am thinking specifically of coordination between the recreational study now being considered by the County and the Natural

Areas Inventory which has been undertaken by the San Juans Conservancy.

At a minimum, of course, we should be sharing relevant information. At a maximum, it might be feasible to do one overall study and then sort out the various levels of information needed. This would obviously be an ambitious undertaking, but it could provide all parties with information of highly valuable scope and detail. Of course, there may be good political reasons for keeping the studies separate and simply sharing information to mutual advantage.

Although we have made some progress with our study, we have found that it is too large and complex a task to be done entirely on a volunteer basis. We have now decided to seek funding for some staff and other expenses. I hope to have a budget and a draft of a proposal completed by the middle of next week.

Assuming that we do decide not to attempt one integrated study, there are two ways you could be of great help to us. The first would be to send me a letter, over your signature or that of Gil Peterson, officially expressing the County's interest in our study, stating that the resulting information could be very useful in helping to shape County planning policy, and offering to cooperate in whatever specific ways you deem suitable. We would use such a letter as part of the documentation in a funding proposal.

The second kind of help you may be able to offer would be to make some County funds available for our study. This might be done on a matching basis; it could also, of course, be conditional on the County gaining access to all information gained in our study.

If any of these suggestions make sense to you, why don't you give me a call sometime next week? By the middle of the week, I should have a clearer idea of what our study may involve in terms of time and money. I am available to come to Friday Harbor any time to do some talking and planning. I have great hopes that, in spite of progress, the San Juans may yet be kept as a reminder of the natural beauties and glories which once filled the world.

Cordially,

Kenneth R. Margolis
Northwest Director

KRM:me

July 25, 1973

Mr. John Schoen
2719 SW 156th
Seattle, Washington 98166

Dear John:

I have been meaning for some time to write and thank you for letting Harriet Rice use your magnificent photographs as part of our article on the Conservancy program in the San Juans. I think the beauty and clarity of your photographs say something about the islands that could never be captured in any prose. Thank you again for associating your work with this article.

I am sorry you were unable to attend our meeting on Lopez on July 14. The meeting was well-attended and much work got done, including a semi-formalization of a cooperative relationship between the Conservancy Committee and San Juan County, and the setting up of four informational meetings to be held on Shaw, Lopez, Orcas and San Juan over the weekend of August 4-5.

It has become clear to me that you, Tony Angell and Larry Coachman are all as busy as you are competent, and that it is simply going to be impossible for any of you to take the time out from your other activities to accomplish the complex and difficult task of a Natural Areas Inventory for the islands. Consequently, Dave Black and I have decided that we will attempt to find funding that will allow us to proceed with a full-time staff. There have been several hopeful signs indicating that funding will be available, and I

hope we will be moving on this while summer is still here. Dennis Willows assures me we will have complete cooperation from Friday Harbor Labor, and I also expect we will be receiving help from the County. I very much hope that you, Larry and Tony will remain aboard in the position of senior advisors.

In fact, I am hoping to get some advice from you right now. I have been told by Supervisor Don Campbell that the U. S. and Canadian Park Services cooperated on a study of several island groups, including the San Juans, and that their work included an inventory of natural areas. Mr. Campbell informed us that they cannot release their work until they have finished writing a report based on their findings, which they hope to do in the next several months. However, he said they would make their results available to us if we cared to go to their Seattle office.

What I am wondering is whether you could spare a couple of hours from your busy schedule to go to the Park Service office in Seattle and go over the results of their study with an eye to evaluating it for thoroughness and relevance. It may be that they have already accomplished the work we have in mind, or that their work will at least form a basis for our study. I think you are the person most equipped to make a judgment on this matter.

I will attempt to reach you by phone regarding this matter, but I have noticed in the past, it is sometime difficult to reach you. So I will be trying, but would also appreciate it if you could try calling me either at the office or at my home (503-286-4539). Feel free to call collect.

Again, thank you for the photographs and for all the help you have given. I believe

that thanks to support such as yours, the Conservancy is going to be able to make a significant contribution to land conservation in the San Juans.

I look forward to talking to you soon.

Cordially,

Kenneth R. Margolis
Northwest Director

KRM:me

THE NATURE CONSERVANCY
NORTHWEST OFFICE

1234 N.W. 25th Avenue
Portland, OR 97210
(503) 228-9561

9 August 1973

Mr. John Black
Box 27
Orcas Island, WA 98280

Dear John,

This letter will describe our current planning for an Inventory of Natural Areas of the San Juan Islands. To date, our activities have consisted of consulting with natural scientists and public officials on the need for such a project and possible methodologies; identifying and beginning to collate sources of information; establishing relationships with individuals and organizations who will be able to help in this work; and developing a specific set of goals and a plan for the project.

The central purpose of this project is to make available all relevant information concerning relatively undisturbed natural areas in the San Juans. By natural areas, we mean land or water units which exemplify typical or unique features, where natural conditions and processes are encouraged or maintained with a minimum of human intervention. The emphasis of this study will be on such areas now in private ownership, although information on public lands will be included to insure comprehensiveness. The areas we will

be identifying must meet at least one of the following criteria:

1. Typical undisturbed samples of major ecosystem types.
2. Habitats of rare or endangered species of plants or animals.
3. Unique or unusual biologic, geologic or paleontologic features.
4. Areas especially suited for research and educational purposes.

Implicit in the results of the Inventory will be information which will be essential to the development of comprehensive land-use planing for San Juan County, particularly in terms of scientifically-based suggestions regarding the carrying capacity of various sites for recreational, domestic and industrial uses. It is our intention, at a minimum, to share the results of this work with appropriate County officials. At a maximum, close coordination between the Inventory staff and the County could insure that information is developed in ways that will be most helpful to the County planning process.

The conceptualization, planning and information gathering which has been done up to this time by this office in cooperation with the technical sub-committee of the San Juans Conservancy Committee, consisting of Dr. Larry Coachman, Tony Angell, and John Schoen. That group will remain active in an advisory capacity, but further planning specifications will be developed by the staff of the project. Staff members will be chosen in consultation with Dr. Dennis Willows, Director of Friday Harbor Laboratories. At this time, it is possible to give a basic outline of the envisioned procedure, which we estimate will take one year.

Since a considerable amount of raw data on the natural resources of the San Juan Islands exists, a large part of the task will consist of collecting, classifying and analyzing the information. Data on topography, soils, climate, vegetation, wildlife and aquatic systems will be collected and collated from all available sources.

Information will be solicited from public agencies, corporations, the academic and scientific communities and amateur naturalists. You will find enclosed a sample of the preliminary questionnaire form currently being used for a similar project in the State of Oregon.

The data will be organized in a file referenced island by island to allow the analysis to proceed systematically. Information will be cross-filed for ecosystem types, habitats of rare or endangered species, especially fragile areas, and perhaps for other elements as well. For Nature Conservancy purposes, areas will be evaluated in terms of preservation value, ecological defensibility and acquisition priority.

Field work will be necessary to double-check areas for which information already exists, and to gather information in areas which have not been studied. Some of the field work will be done by staff personnel, but we also plan to recruit a corps of volunteer 'field informants' to help provide the necessary field data.

The results of this study will afford complete and updated information which will have a wide range of uses, from recreational planning to the preparation of environmental impact statements to facilitating communications between public agencies and between

public agencies and private citizens. The Nature Conservancy, with its close ties to the scientific community, its wide range of volunteer members and its long history of organizational experience is in a unique position to be able to coordinate this effort at minimum expense and with maximum effect. A preliminary budget is enclosed.

We are currently seeking funding for this project. I would like to suggest that San Juan County undertake to underwrite some major proportion of the expenses involved. Obviously, the County stands to be a major beneficiary of such a study, and, as mentioned above, County participation in the planning process is welcomed. Furthermore, County participation in and substantial financial support to this project would virtually assure that the balance of the funds would become available.

I would be glad to take whatever steps are necessary to assure County consideration of this matter, including personal consultation with County officials and the preparation of a more formal proposal. I will await guidance from you before proceeding further with communications to the County. Meanwhile, I do intend to be exploring other potential sources of funding. I would very much like to be in gear by Fall and hope that will be possible.

Sorry I didn't see you last week in the Islands. We had a good series of meetings - especially on Shaw and Lopez, where we had good attendance and high interest. I believe there is a rapidly growing base of popular support for intelligent land-use planning in the Islands, and this should make your job somewhat less impossible. Thank you for sending me a copy of the Planning Department binder. I think it is one of the best educational/organi-

zational tools I have ever seen used by any public agency. I hope our office will receive the updates as they come out. I would also be interested in knowing the general reaction to the binder and its contents.

I look forward to my next trip to the Islands and hope we will see each other at that time.

Cordially,

Kenneth R. Margolis
Northwest Director

KM/jjb

Enclosures

cc: David Black
Dennis Willows

MINUTES
OF THE SAN JUAN COUNTY
PLANNING COMMISSION

The San Juan County Planning Commission met in regular meeting on November 21, 1974, at the Island Lopez, Lopez Island, at 10:30 a.m. The following members were present:

Eleanor Howard, San Juan Island, Chairman
Charles Livesey, Orcas Island, Vice Chairman
Douglas Bonamy, Lopez Island
James Klauder, Orcas Island
Malcolm MacLeod, Lopez Island
Einar Nielsen, San Juan Island
Ralph Rich, San Juan Island
Harold Whitaker, Shaw Island

Also present were:

Donald Whitmill, County Commissioner
Victor Bartig, County Commissioner
Robert McAbee, Planning Department Director
John Dustrude, Planning Department
Ivan Scherer, County Sanitarian
John Thalacker, San Juan Surveying, Inc.
Ken Margolis, The Nature Conservancy
Spencer Beebe, The Nature Conservancy
Visitors of record

The meeting was called to order by the Chairman. The review and approval of the minutes was postponed to a later time in the meeting in order to give the Nature Conservancy representatives time to give their report on "Natural Systems Inventory in San Juan County.

Mr. McAbee introduced Ken Margolis and Spencer Beebe of the Nature Conservancy. Mr. Margolis

outlined the purpose of the Nature Conservancy. Their goals are specific--the preservation of natural areas that are unique or especially representative of the natural area system. He said that as diversity disappears, so does the ecological balance. He then told how the Nature Conservancy has attempted to preserve such areas through the United States. He noted that this study is the first county-wide natural areas inventory in the United States, and gives comprehensive information about what exists in San Juan County. The natural areas are rated as to comparative importance. The inventory was done with the help of private foundations and the County Planning Department.

Mr. Beebe then discussed the San Juan County Inventory. The inventory consists only of natural areas on private lands with no consideration of similar areas that might be on publicly owned lands. They are involved only with private lands because they consider that there is already a kind of preservation control of public lands. The inventory should lead to the preservation of natural areas. 64 natural areas have been described in the San Juan County report in the order of their priority, and they are now ready for the next step in the implementation of the preservation of these areas. It gives a base on which to make future planning decisions, and the hope is that it will be continually up-dated. Mr. Beebe said it is not the intention of The Nature Conservancy to become large land owners in San Juan County; however, the report does contain strong recommendations. The Nature Conservancy would like to be a cooperating, private agent in the planning process in San Juan County. Mr. Beebe feels that if there were imaginative planning in the County for the preservation of natural areas, that there

would be Federal funds available. At the request of the Director of the Planning Department, he listed those who were responsible for compiling the inventory. He also noted that they had received wonderful cooperation from the San Juan County Planning Department and that they had done their best to be sure that the information contained in the report is responsible. He also noted that this is a draft report that may contain errors, but when the report is finally completed, it should be accurate.

There followed a general discussion of the report during which it was suggested that the Planning Commission might request a 12-month moratorium on the most important areas in order to give the County a chance to protect these areas. Mr. Bartig noted that if these areas, which represent 12% of the County land, were taken off the tax roles, that with the other property already off the roles, there would be a total of 25% of the taxable property off the tax roles. This would have a serious impact on the taxpayers, many of whom feel they are already overtaxed.

Mr. Margolis said the high priority areas total much less than the 14,000 acres mapped. Special areas should be given special consideration, because when they are lost, they are lost permanently. There are 8 or 9 high-priority areas listed in the report. Mr. Thalacker suggested that it is important to know what natural areas are held by public ownership before giving priority to areas under private ownership, and also that people who had lived in the Islands for a long time and who were not consulted could have given valuable information to those preparing the study.

The Chairman said it is up to the Planning

Commission, the Planning Department, and the County Commissioners to supplement the report with local knowledge. This points up the importance of the Planning Department.

It was decided that 3 copies of the report would be sufficient for the Planning Commission, since Nature Conservancy funds are very short. Copies will be circulated among the members on each Island. Although having only 3 copies precludes wide circulation, Mr. McAbee noted that this was an inventory done by the private sector at no public expense, that will be very valuable. Mr. Whitaker suggested that the report gives the kind of information we need in deciding whether certain construction should be done.

The Chairman thanked the men for presenting their report, after which it was moved by Mr. Klauder, seconded by Mr. Rich, and carried unanimously, that:

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR SAN JUAN COUNTY

CARL R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington corporation,	)	
Plaintiffs,	)	NO. 3117
vs.	)	
THE NATURE CONSERVANCY, INC., a foreign corporation; et al.,	)	DEPOSITION UPON ORAL EXAMINATION OF ROBERT R. McABEE
Defendants.	)	

Taken at Friday Harbor, Washington on January 18, 1977.

* * * * * * * * * * *

Page 19, lines 17-24:

A Again my memory is a little vague. It seemed to me that they had made a serious contact for the purpose of seeing where Nature Conservancy could be helpful to the County in its planning endeavor, particularly as it applied to the natural systems, the nature characterists of the County. And apparently

they had discussed this before, and I don't know with whom.

* * * * * * *

Page 20, lines 16-23:

A . . .; that apparently for a long time they had indeed been in the acquisition phase of protecting the environment, but with the renewed emphasis on the environment nationally they just didn't have the money to continue that technique; and so they were trying to function through more established private and public channels for the purpose of protecting the environment.

* * * * * * *

Page 22, lines 16-22:

A . . . And finally, I affirmed with considerable anticipation that the scientific inventory of natural areas would indeed be extremely beneficial to the County in possessing knowledge essential to meeting the requirements of the

Environmental Policy Act and other related legislative acts.

* * * * * * *

Page 23, lines 13-17:

A . . . The only thing I can remember is the reference to the environmental concern being so great it was really tough on their treasury and they were seeking out more traditional methods of protecting the environment.

* * * * * * *

Page 33, lines 12-14:

A It was undoubtedly helpful in the determination of the application of one or two of the proposed designations in the Land Use Plan.

* * * * * * *

Page 54, lines 21-24:

A . . . there were legal techniques for preservation and enhancement of an environment in the public as well as the private sector, other than acquisition. That was my understanding, . . .

* * * * * * *

Page 56, line 11 - Page 57, line 3"

A By "good offices," I think I was using an economic term. It may have been a gross assumption, but I assumed we have engendered some goodwill in the County. And to the extent that that goodwill would be instrumental in helping for The Nature Conservancy to conduct its inventory, that's what I meant by "good offices."

That would not be the case, as I do not feel it's my role to be an advocate on behalf of a private citizen's desire to undertake development. To the contrary, the responsible role of a public official is, first, what is in the general public interest as distinguished from any one individual interest. And I'm under the impression that there is considerable support for the proposition that the enhancement and perpetuation of

our natural environment is essential to the general welfare of the people who inhabit this earth.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR SAN JUAN COUNTY

CARL R. LANGE and RUBY J. LANGE, his wife, and LITMAR, INC., a Washington corporation,	)	
Plaintiffs,	)	NO. 3117
vs.	)	
THE NATURE CONSERVANCY, INC., a foreign corporation; et al.,	)	DEPOSITION UPON ORAL EXAMINATION OF LINDA HENRY
Defendants.	)	

Taken at Friday Harbor, Washington, on January 17, 1977.

* * * * * * * * * * *

Page 15, line 1 - Page 16, line 2:

Q Do you recall when that was and the circumstances?

A Not specifically, no.

Q Generally? Was there a presentation to the Board and a request made, action taken?

A Yes. I don't know what kind of action. There was a request made to the Board if

San Juan County would be interested in joining with The Conservancy.

Q And by whom was that request made?

A I'll be damned if I can remember who was there.

Q Was this at a Commissioners' meeting?

A Yes.

Q It would show on the minutes of that meeting?

A Yes, it should.

MR. VETTER: Can we take about a two-minute break.

(A short break was taken).

MR. VETTER: Let's start again.

Q As a result of this contact, this Commissioners' meeting contact, did the Commissioners authorize the County to participate in The Nature Conservancy project in any way?

A Yes, in a limited way.

Q In what way is that?

A Funds weren't available to support the

project; so, we agreed to allow The Conservancy people to use a portion of, I think a desk and some chairs in the Planning Department.

* * * * * * * *

Page 33, lines 16-17:

A I think that that would be pretty much up to Mr. McAbee to determine.

* * * * * * * *

94TH CONGRESS) HOUSE OF (REPORT
2d Session) REPRESENTATIVES (NO. 94-1558

THE CIVIL RIGHTS ATTORNEY'S FEES ACT OF 1976

September 15, 1976 -- Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

MR. DRINAN, from the Committee on the Judiciary, submitted the following

R E P O R T

> ". . . the courts have developed a different standard for awarding fees to prevailing defendants because they do 'not appear before the court cloaked in a mantle of public interest.' United States Steel Corp. v. United States, 519 F.2d 359, 364 (3rd Cir., 1975). As noted earlier such litigants may, in proper circumstances, recover their counsel fees under H. R. 15460. To avoid the potential "chilling effect" noted by the Justice Department and to advance the public interest articulated by the Supreme Court, however, the courts have developed another test for awarding fees to prevailing defendants. Under the case law, such an award may be made only if

the action is vexatious and frivolous, or if the plaintiff has instituted it solely 'to harass or embarrass' the defendant. United States Steel Corp. v. United States, supra, at 361. If the plaintiff is 'motivated by malice and vindictiveness," then the court may award counsel fees to the prevailing defendant. Carrian v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976). Thus if the action is not brought in bad faith, such fees should not be allowed. See, Wright v. Stone Container Corp., 5 F.2d 1058 (8th Cir. 1975); see also Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971), aff'd without published opinion, 468 F.2d 951 (5th Cir. 1972). This standard will not deter plaintiff from seeking relief under these statutes, and yet will prevent them from being used for clearly unwarranted harassment purposes."

Supreme Court, U. S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 79-1854

CARL R. LANGE, RUBY J. LANGE, his wife, and LITMAR, INC., a Washington Corporation,

Petitioners,

v.

THE NATURE CONSERVANCY, INC., a foreign corporation; COUNTY OF SAN JUAN; LINDA HENRY, DONALD WHITMILL and PATRICK ROE, individually and as County Commissioners of San Juan County; ROBERT McABEE, individually and as Director, San Juan County Planning Department; KENNETH R. MARGOLIS; and SPENCER B. BEEBE

Respondents,

and

STERLING MILLER; SASHA LEEPER; LISA PETERFREUND; LINDA MORRISON; and JOHN DOES ONE through SIX,

Defendants.

BRIEF OPPOSING PETITION FOR CERTIORARI

Stimson Bullitt
Attorney for Respondents
The Nature Conservancy, Inc.
Kenneth R. Margolis, Spencer B.
Beebe and Linda Henry, Individually
4300 Seattle-First National Bank Bldg.
Seattle, Washington 98154
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ABCD AT CRAFTSMAN PRESS, SEATTLE

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QUESTIONS PRESENTED

1. Whether the Washington State Courts, in entering summary judgment, denied Petitioners a jury trial in violation of the U.S. Constitution, 7th Amendment (Petit., 5, 57).

2. Whether the Washington State Courts erroneously entered summary judgment in disregard of material issues of disputed fact.

3. Whether the Petitioners were denied substantive due process under the U.S. Constitution, 5th and 14th Amendments, by inverse condemnation, when respondent San Juan County accepted the land Inventory, that included Petitioners' island in it, from respondent The Nature Conservancy, Inc., which had compiled the Inventory.

4. Whether the Petitioners were denied procedural due process in violation

of the U.S. Constitution, 14th Amendment, and 42 U.S. §1983 by respondents' failure to allow Petitioners to participate in the process by which respondent County accepted the land Inventory as a document for use in its land use policies.

5. Whether respondents denied Petitioners equal protection of the laws in violation of 42 U.S.C. §§1985(3) and 1986.

6. Whether the Washington State Courts had authority under 42 U.S.C. §1988 to award attorneys' fees to respondents as the "prevailing parties."

REASONS FOR DENYING THE WRIT

1. Denial of Right to Jury Trial—7th Amendment.

(a) The summary judgment was based on a determination of no issues of material fact, and (b) this proceeding was in state court.

2. Alleged Disregard of Issues of Material Fact.

This set of alleged errors may be properly considered only if the Court chooses to review the Washington Courts' assessment of the factual statements in the record and to determine whether (a) material issues of disputed fact were disregarded and (b) whether this disregard denied Petitioners' rights under the U.S. Constitution or U.S. statutes.

3. Claim of Inverse Condemnation—5th and 14th Amendments.

The Inventory of Natural Areas on Private Lands (Petit., Appendix A-8, A-54), compiled by respondent The Nature Conservancy, Inc., listed 57 parcels of land in the County, one of them Petitioners' island. Petitioners allege (Petit., 34, 36-37, 55-57) that the effect of the Inventory, through combination with the County government, was

to "down zone" the Petitioners' land, thereby constituting a "taking."

The Petition (p. 32) asserts that the County adopted the Inventory as land use policy by putting its recommendations into the County's Shoreline Master Program. However, this Program never entered the court record in this proceeding. (See Respondents' Brief, p. 14-15, Washington State Court of Appeals).

The record shows no causal connection between state action and any loss of property rights to Petitioners. The record (Petit., App. A-55) shows that San Juan County did not adopt or establish the Inventory or its contents as County land use policy and that the County used the Inventory only as a reference or resource document, an advisory source for considering future land use policies (Clerks Papers 235). The record does not show that the County has

adopted any land use policies (whether influenced by the Inventory or from any other source) that might impair Petitioners' use of their land.

The record contains no information about Petitioner's land value—either before the alleged injury or after, only the assertion that the value has dropped (Petit., App. A-13, 15). This may be an economic misfortune, but in itself is not a legal injury. The record does show (Lange Dep. 80), that the valuation of Petitioners' land for real estate taxes has not been lowered.

Even if San Juan County had adopted a land use policy that had restricted Petitioners' rights to use their land, such action would not in itself constitute a constitutional taking unless (and the record here does not show this) the restriction was "not reasonably necessary to the effectuation of a substantial public purpose

[citations omitted] or perhaps if it has an unduly harsh impact upon the owners' use of the property." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127; 57 L. Ed. 2d 631, 650; 98 S. Ct. 2646 (1978). And cf. John R. Carlson v. United States, 556 F.2d 489, 214 Ct. Cl. 1 (1977).

4. Alleged Denial of Procedural Due Process by Violation of 42 U.S.C. §1983.

Petitioners claim (Petit. 65) that the Civil Rights Act of 1871 is violated by a county that decides to gather information without first holding a public hearing on the question whether so to decide.

The Inventory was what might be called an "environmental opportunity statement." Petitioners appear to contend that procedural due process for potentially affected parties requires that a decision to permit such a study be preceded by public hearings and, in

effect, making an environmental impact statement (EIS). But an EIS itself is a form of study, so to require an EIS as a condition of making a study would mean requiring an EIS as a condition of an EIS—an unbreakable circle.

5. Alleged Denial of Equal Protection By Conspiracy that Violated 42 U.S.C. §1985(3) and §1986.

a. Claim.

Petitioners claim (Petit. 59 and 70-73) that the respondents combined to subtract from Petitioners' bundle of property rights by making Petitioners' island and reef a kind of public park, to keep it in its pristine state of nature, worthless on the real estate market, and to do this without paying for it.

b. Only an Open and Legal Relationship.

But no facts are shown either that Petitioners' property rights

have been taken or that there have been conspiratorial acts toward that end. The record shows no relationship between The Nature Conservancy and the County other than an open and legal one. Even if abdication were regarded, as Petitioners claim (Petit. 59, 70, 72), as constituting conspiracy, the record contains no facts showing that the County abdicated its function to The Nature Conservancy.

c. Owner's Opinion Evidence— Value But Not Conspiracy.

In his role as an owner, Petitioner Lange may be qualified to state his opinion of the value of his land. But he is not qualified to give as evidence his opinion that the value has been depressed by a conspiracy. Anyone could bring a case to trial if he could make a material issue of fact by his opinion testimony on conclusionary facts that he had pleaded.

d. Conspiracy Inferred Backward, From Alleged County Policy to Inventory.

According to the facts in the record, the County did not adopt the Inventory as county policy. However, Petitioners nonetheless claim that the County has adopted it (Petit. 30-32, 72) and Petitioners then infer a prior conspiracy from the claimed fact of later adoption.

As to reason, Petitioners' thinking recognizes that causality seems to run the world, and that causes bump each other in time sequence, so any event is preceded by a chain of prior causes. So far so good. But petitioners then take a leap not of reason but of faith, in the maxim of post hoc ergo propter hoc, a proposition that is not made true by its statement in an ancient language. The error, of course, is to select from among the infinite number of

prior events one event and attribute it to today's event simply on the basis of its priority in time.

Just because the County may have adopted land use restrictions after The Nature Conservancy impliedly suggested them in its Inventory study does not show that the former caused the latter, and improperly caused at that.

Using the same reasoning, arbitrarily selecting a prior event for attribution, one could attribute this lawsuit to a propensity to litigate. Although the Inventory contained 57 parcels and covered over 12,000 acres, only Petitioners claimed that respondents had oppressed them, and appellant Lange is a veteran litigant, even an inveterate litigant, admitting (Clerk's Papers 328) that this is his 14th lawsuit in Washington State Superior Court, all but one involving land use.

Petitioners' selective attribution fails in law as well as in reason. They

argue that where conspiracy is charged and the facts could indicate either conspiracy or a lawful purpose, the rule that the non-moving party's case is to be interpreted in the most favorable light must turn the compass needle to the interpretation of conspiracy and thereby create a material issue of fact. However, according to O'Brien v. Larson, 11 Wn. App. 52, 55-56, 521 P.2d 228 (1974), to show conspiracy by circumstantial evidence, the facts must be inconsistent with a lawful purpose. That case concerned dismissal at the close of plaintiff's case rather than summary judgment, but the "most favorable light" rule seems to be the same for each form of decision.

e. Burdensome Regulations Do Not Show Conspiracy.

Petitioners have made the analogy of themselves as Gulliver, bound by threads of a government web. Now, the claim

that individual freedom is being narrowed by government regulations is a legitimate argument, but even if the argument were true and not just legitimate, and even if the record showed government restrictions imposed on Petitioners—which it does not—it does not follow that such general restrictions are owing to a conspiracy.

6. Authority to Award Defendants Attorneys' Fees Under 42 U.S.C. §1988

a. The Washington State Courts Had Authority to Apply §1988.

State courts have awarded attorneys' fees under §1988. Board of Trustees, Etc. v. Holso, 584 P.2d 1009, 1019 (Wyo. 1978) and Ashley v. Curtis, 413 N.Y.S.2d 528, 529, 67 A.D.2d 828 (1979), Attorneys' fees to the prevailing party in an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e)

et seq. have been allowed even for state administrative proceedings. Carey v. New York Gaslight Club, 598 F.2d 1253, 1259 (2d Cir. 1979).

b. Petitioners' Action Was Without Foundation.

(i) Law (Christiansberg).

In a civil rights claim, where the plaintiff has lost, an award may be granted to the defendant as the prevailing party where the action was ". . . without foundation, even though not brought in subjective bad faith, . . ." or where found that the action was ". . . frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansberg Garment Co. v. EEOC, 434 U.S. 412, 421, 422; 54 L. Ed. 2d 648, 657; 98 S. Ct. 694 (1978).

(ii) Record.

The summary judgment explains why the trial court made no findings

of fact and therefore made no finding of a lack of foundation.

A lack of foundation is implied by the fact that the trial court made a summary disposition of the case after the litigation had been going on for 26 months, during which this mass of claims could have been dropped.

The trial court further implied a finding of a lack of foundation by its statement, in its memorandum on its attorneys' fees award, that "I am inclined to believe that a denial thereof could well be determined an abuse of discretion." (Petit. App. A-42). With the authority of Christiansberg to guide it, the Washington State Court of Appeals approved the trial court award. It also approved an additional award for the appeal by relying on Washington Rule of Appellate Practice 18.1 as well as 42 U.S.C. §1988.

The strenuous defense made to this action does not imply that the claims had a foundation, since defendants/respondents were faced with a million dollars and more in claims against them (Petit., App. A-28-30).

The record shows that this is not one of those cases where some significant fact negating liability comes to light in the course of discovery proceedings, where at the start liability was indicated. The record here provides much information but no revelations.

For five years now, Petitioners have been pressing this litigation, losing on every point and at every step, continuing to litigate long after their action clearly was shown to be groundless. The accumulation of information about the case and the accumulated examination which has been made of this information tend to confirm the lack of foundation.

(iii) Atypical Economic Comparison Between the Parties.

In civil rights cases, courts are understandably reluctant to characterize a defendant as "prevailing" for a fee award where the only basis would be that the plaintiff simply has not won his suit. The prospect of having to pay the expenses of both sides may deter prospective plaintiffs from bringing a deserving suit. Such deterrent rests, in part, on the disproportionate economic comparison between the average plaintiff and the average defendant in a civil rights action.

But here, Petitioners are a real estate developer and his corporation, rather than an out-of-work schoolteacher or fireman who has been discharged or harassed out of a job. Petitioners own an island of about 25 acres (Lange Dep. 8). No evidence

was given as to value, but the land's annual taxes are $4,000 (Dep. 36), and Petitioners claim a loss in property values alone of $930,000 (Petit., App. A-13). By contrast, among the defendants here are a charitable corporation of modest size and several individuals, sued in their private capacities, who had to sustain the defense from their own pockets.

CONCLUSION

The diffuse and prolix Petition is difficult to meet responsively and informatively for this Court.

There seems to be no conflict of decisions affecting this case, which turns on its own facts. The record here does not show that the Washington Courts have decided any federal question of substance "not heretofore determined by this Court" or "in a way probably not in accord with applicable decisions of this Court." The Petition for Certiorari should be denied.

Dated: June 13, 1980.

Respectfully submitted,

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By _____
of Attorneys for Respondents